APPENDIX

JUL 26 1972

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1304

CHARLES B. BRADLEY, JR., ET AL.,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 10, 1972
CERTIORARI GRANTED JUNE 12, 1972

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

1971

Mar. 18 Indictments returned against all four defendants:

	Counts
United States vs. Charles B. Bradley, Jr.	1, 3, 4
Byron H. Johnson	1, 2
Robert T. Odell, Jr.	1, 5
William James Helliesen	1, 6

26 U.S.C. 7237(b)—Conspire to sell a narcotic drug, Cocaine (count 1)

26 U.S.C. 4705(a)—sell a narcotic drug without written order (counts 2, 3)

19 U.S.C. 924(c)(2)—Carry a firearm during commission of a felony (counts 4, 5, 6)

29 Four defendants appear with counsel for arraignment, United States District Court, District of Massachusetts, before Wyzanski, Ch.J.

May 4 Jury trial commenced.

6 Jury returns with following verdicts:

Count 1	Charles B. Bradley, Jr.	Guilty
	Robert T. Odell, Jr.	Guilty
	Byron H. Johnson	Guilty
	William James Helliesen	Guilty
Count 2	Byron H. Johnson	Not Guilty
Count 3	Charles B. Bradley	Not Guilty
Count 4	Charles B. Bradley	Guilty
Count 5	Robert T. Odell, Jr.	Guilty
Count 6	William James Helliesen	Guilty

June 7 Defendants Bradley and Odell file notice of appeal.

11 Defendants Johnson and Helliesen file notice of appeal.

1972

Jan. 27 Opinion from Courts of Appeals entered . . . Affirmed.

Feb. 8 Motion for order vacating sentences and for remand of appellants filed, Motion for stay of mandate filed in Court of Appeals.

Mar. 10 Order of Court of Appeals, First Circuit, denying motions for vacating sentences, for remand and for stay of mandate.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No. 71-147-W

UNITED STATES OF AMERICA

v.

CHARLES B. BRADLEY, JR.
BYRON H. JOHNSON
ROBERT T. O'DELL, JR.
WILLIAM J. HELLIESEN

INDICTMENT

The grand jury charges:

COUNT I

From on or about March 4, 1971, and continuously thereafter up to and including March 12, 1971 at Cambridge and Provincetown in the District of Massachusetts and various other places known and unknown to the grand jury, CHARLES B. BRADLEY, JR., BYRON H. JOHNSON, ROBERT T. ODELL, JR., WILLIAM J. HELLIESEN, and Arthur Motsis (named herein as a co-conspirator but not a defendant) did wilfully and knowingly combine, conspire, confederate, and agree together and with each other and with divers other persons whose names are to the grand jury unknown, to commit an offense against the

United States, that is, to sell, barter, exchange, and give away a narcotic drug, to wit: a quantity of cocaine not in pursuance of a written order of the person to whom such narcotic was to be sold on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate, in violation of Title 26, United States Code, Section 4705 (a); all in violation of Title 26, United States Code, Section 7237(b).

OVERT ACTS.

In furtherance of the conspiracy and to effect the object thereof:

1. On or about March 4, 1971, CHARLES B. BRADLEY met with a special agent of the Bureau of Narcotics and Dangerous Drugs concerning the sale of cocaine.

2. On or about March 11, 1971, CHARLES B. BRADLEY had a conversation with a special agent of the Bureau of Narcotics and Dangerous Drugs concerning a date when a sale of cocaine to the agent could be effectuated.

3. On or about March 12, 1971, CHARLES B. BRADLEY met with two special agents of the Bureau of Narcotics and Dangerous Drugs in an automobile in Cambridge. BRADLEY stated that he would sell a quantity of cocaine for $9500.

4. On or about March 12, 1971, CHARLES B. BRADLEY, BYRON H. JOHNSON and ROBERT T. ODELL had a conversation concerning the cocaine to be sold at 73 Magazine Street in Cambridge with a special agent of the Bureau of Narcotics and Dangerous Drugs.

5. On or about March 12, 1971, WILLIAM J. HELLIESEN, CHARLES B. BRADLEY, BYRON H. JOHNSON and ROBERT T. ODELL were present in the apartment at 73 Magazine Street at the time when the transfer of cocaine to a special agent of the Bureau of Narcotics and Dangerous Drugs was to take place.

6. On or about March 12, 1971, WILLIAM J. HELLIE-

SEN transported a quantity of cocaine to 73 Magazine Street, Cambridge in his automobile.

COUNT II

On or about March 12, 1971 at Cambridge in the District of Massachusetts, BYRON H. JOHNSON did sell, barter, exchange, and give away a narcotic drug, that is a quantity of cocaine, not in pursuance of a written order of the person to whom such narcotic was sold on a form issued in blank for that purpose by the secretary of the Treasury or his delegate; in violation of Title 26, United States Code, Section 4705(a).

COUNT III

On or about March 12, 1971 at Cambridge in the District of Massachusetts, CHARLES B. BRADLEY, JR., did sell, barter, exchange, and give away a narcotic drug, that is, a quantity of cocaine, not in pursuance of a written order of the person to whom such narcotic was sold on a form issued in blank for that purpose by the secretary of the Treasury or his delegate; in violation of Title 26, United States Code, Section 4705(a).

COUNT IV

On or about March 12, 1971 at Cambridge in the District of Massachusetts, CHARLES B. BRADLEY, JR., did wilfully, knowingly and unlawfully carry a firearm, to wit: P. Beretta-Gardone V.T., Caliber 22 LR—Model 1948, Serial No. 076851 N, an automatic pistol containing a clip of seven rounds of ammunition, during the commission of a felony which may be prosecuted in a court of the United States, that is, a violation of Title 26, United States Code, Sections 4705(a) and 7237(b); in violation of Title 18, United States Code, Section 924(c)(2).

COUNT V

On or about March 12, 1971 at Cambridge in the District of Massachusetts, ROBERT T. ODELL, JR. did wilfully,

knowingly and unlawfully carry a firearm, to wit: Fabrique Nationale D'Arma, DeGuerre Herstal Belgique, Caliber 32, Serial No. 143694, an automatic pistol containing a clip with six rounds of ammunition, during the commission of a felony which may be prosecuted in a court of the United States, that is, a violation of Title 26, United States Code, Section 4705(a) and Section 7237(b); in violation of Title 18, United States Code, Section 924(c)(2).

COUNT VI

On or about March 12, 1971 at Cambridge in the District of Massachusetts, WILLIAM J. HELLIESEN did wilfully, knowingly and unlawfully carry a firearm, to wit: Mac-C, 1919 Model 1935 S, M1, Caliber 7.65 L, an automatic pistol containing a clip with six rounds of ammunition, during the commission of a felony which may be prosecuted in a court of the United States, that is, a violation of Title 26, United States Code, Sections 4705(a) and 7237(b); in violation of Title 18, United States Code, Section 924(c)(2).

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

Cr No. 71-147-W

UNITED STATES OF AMERICA
v.
CHARLES B. BRADLEY, JR.

JUDGMENT AND COMMITMENT

On this 2nd day of June, 1971 came the attorney for the government and the defendant appeared in person and by counsel

IT IS ADJUDGED that the defendant upon his pleas of not guilty as to counts 1, 3, and 4, and verdicts of guilty as to counts 1, 4, and not guilty as to count 3, has been convicted

of the offenses of violations of Title 26, U.S.C., Section 7237(b) in that he did wilfully conspire with other persons to commit an offense against the United States, that is, to sell a narcotic drug (cocaine) not in pursuance of a written order on a form issued in blank by the Secretary of the Treasury; and Title 18, U.S.C., Section 924(c)(2) in that he did wilfully, knowingly and unlawfully carry a firearm during the commission of a felony which may be prosecuted in a court of the United States, as charged in an Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a period of five (5) years on count 1. The Court directs that defendant be given credit for the six (6) days he has already spent in custody from March 12, 1971 through March 17, 1971. And on count 4, defendant be imprisoned for a period of one (1) year, said prison sentence to be served on and after the sentence imposed on count 1; said prison sentence is suspended, and defendant is placed on probation for a period of three (3) years.

IT IS ADJUDGED that both sentences are stayed pending appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the Deputy United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

(s) C. WYZANSKI
United States District Judge.

(s) RUSSELL H. PECK *Clerk.*

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

Cr No. 71-147-W

UNITED STATES OF AMERICA
v.
WILLIAM JAMES HELLIESEN

JUDGMENT AND COMMITMENT

On this 2nd day of June, 1971 came the attorney for the government and the defendant appeared in person and by counsel

IT IS ADJUDGED that the defendant upon his pleas of not guilty as to counts 1 and 6, and verdicts of guilty as to counts 1 and 6, has been convicted of the offenses of violations of Title 26, U.S.C., Section 7237(b) in that he did wilfully conspire with other persons to commit an offense against the United States, that is, to sell a narcotic drug (cocaine) not in pursuance of a written order on a form issued in blank by the Secretary of the Treasury; and Title 18, U.S.C., Section 924(c)(2) in that he did wilfully, knowingly and unlawfully carry a firearm during the commission of a felony which may be prosecuted in a court of the United States, as charged in an Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Atorney General or his authorized representative for imprisonment for a period of five (5) years on count 1. The Court directs that defendant be given

credit for the four (4) days he has already spent in custody, from March 12, 1971 through March 15, 1971. And on count 6 defendant be imprisoned for a period of one (1) year, said prison sentence to be served on and after the sentence imposed on count 1; said prison sentence is suspended, and defendant is placed on probation for a period of three (3) years.

IT IS ADJUDGED that both sentences are stayed pending appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the Deputy United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

(s) C. WYZANSKI
United States District Judge.

(s) RUSSELL H. PECK *Clerk.*

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

Cr No. 71-147-W

UNITED STATES OF AMERICA
v.
ROBERT T. ODELL, JR.

JUDGMENT AND COMMITMENT

On this 2nd day of June, 1971 came the attorney for the government and the defendant appeared in person and by counsel

IT IS ADJUDGED that the defendant upon his pleas of not guilty as to counts 1 and 5, and verdicts of guilty as to counts 1 and 5, has been convicted of the offenses of violations of Title 26, U.S.C., Section 7237(b) in that he did wilfully conspire with other persons to commit an offense

against the United States, that is, to sell a narcotic drug (cocaine) not in pursuance of a written order on a form issued in blank by the Secretary of the Treasury; and Title 18, U.S.C., Section 824(c)(2) in that he did wilfully, knowingly and unlawfully carry a firearm during the commission of a felony which may be prosecuted in a court of the United States, as charged in an Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years on count 1. The Court directs that defendant be given credit for the five (5) days he has already spent in custody, from March 12, 1971 through March 16, 1971. And on count 5, defendant be imprisoned for a period of one (1) year, said prison sentence to be served on and after the sentence imposed on count 1; said prison sentence is suspended, and defendant is placed on probation for a period of three (3) years.

IT IS ADJUDGED that both sentences are stayed pending appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the Deputy United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

(s) C. WYZANSKI
United States District Judge.

(s) RUSSELL H. PECK *Clerk.*

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

Cr No. 71-147-W

UNITED STATES OF AMERICA
v.
BYRON H. JOHNSON

JUDGMENT AND COMMITMENT

On this 2nd day of June, 1971 came the attorney for the government and the defendant appeared in person and by counsel

IT IS ADJUDGED that the defendant upon his pleas of not guilty as to counts 1 and 2, and verdicts of guilty as to counts 1 and 2, and verdicts of guilty as to count 1, and not guilty as to count 2, has been convicted of the offense of violation of Title 26, U.S.C., Section 7237(b), in that he did wilfully conspire with other persons to commit an offense against the United States, that is, to sell a narcotic drug (cocaine) not in pursuance of a written order on a form issued in blank by the Secretary of, the Treasury, as charged in an Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years. The Court directs that defendant be given credit for the fifteen (15) days he has already spent in custody, from March 12, 1971 through March 26, 1971.

IT IS ADJUDGED that both sentences are stayed pending appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the Deputy United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

(s) C. WYZANSKI
United States District Judge.

(s) RUSSELL H. PECK *Clerk.*

TRANSCRIPT OF SECOND DAY OF TRIAL

[Title omitted in printing]

[Day 2, p. 4]

* * *

Mr. Homans: Your Honor, it now being May 4th, taking into consideration the repeal of 26 United States Code, Section 7237, I think it should be stated for the record that all defense counsel to my knowledge have suggested to the Office of the United States Attorney that they would be prepared to discuss the question of pleading to informations carrying non-mandatory minimum sentences. I say this merely for the record and not to put pressure on my brother, but since it may raise questions in the future, as to the effect of that amendment, and the position it puts the defendants and defense counsel in, we have offered to discuss the question of pleading to non-mandatory counts. We have not been successful.

Mr. Ware: I have discussed the question and I refuse to dismiss the mandatory charges.

The Court: Is the statute exactly the same except reduction of penalty?

Mr. Ware: No, Your Honor.

Mr. Chisholm: May I have the statement now?

Mr. Ware: Yes.

End of conference at the bench.)

* * *

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 71-1186, 71-1187,
71-1188, 71-1189.

UNITED STATES OF AMERICA,
APPELLEE,

v.

CHARLES B. BRADLEY, JR.,
BYRON H. JOHNSON,
ROBERT T. ODELL, JR., and
WILLIAM JAMES HELLIESEN,
DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

January 27, 1972

(Opinion appears in Petition for Writ of Certiorari at pp. 18-29)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 71-1186.

UNITED STATES OF AMERICA,
APPELLEE,

v.

BYRON H. JOHNSON,
DEFENDANT, APPELLANT.

JUDGMENT

Entered: January 27, 1972

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
(s) DANA H. GALLUP,
Clerk.
By: (s) FRANCIS P. SCIGLIANO
Chief Deputy Clerk.

[cc: Messrs. Homans and Ware.]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 71-1187.

UNITED STATES OF AMERICA,
APPELLEE,
v.
WILLIAM HELLIESEN,
DEFENDANT, APPELLANT.

JUDGMENT

Entered: January 27, 1972

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
(s) DANA H. GALLUP,
Clerk.
By: (s) FRANCIS P. SCIGLIANO
Chief Deputy Clerk.

[cc: Messrs. Homans and Ware.]

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 71-1188.

UNITED STATES OF AMERICA,
APPELLEE,
v.
CHARLES B. BRADLEY, JR.,
DEFENDANT, APPELLANT.

JUDGMENT

Entered: January 27, 1972

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

Enter:

By the Court:
(s) DANA H. GALLUP,
Clerk.
By: (s) FRANCIS P. SCIGLIANO
Chief Deputy Clerk.

[cc: Messrs. Lapon and Ware.]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 71-1189.

UNITED STATES OF AMERICA,
APPELLEE,
v.
ROBERT T. ODELL, JR.,
DEFENDANT, APPELLANT.

JUDGMENT

Entered: January 27, 1972

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

Enter:

By the Court:
(s) DANA H. GALLUP,
Clerk.

By: (s) FRANCIS P. SCIGLIANO
Chief Deputy Clerk.

[cc: Messrs. Altman and Ware.]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 71-1186, 71-1187,
71-1188, 71-1189.

UNITED STATES OF AMERICA,
APPELLEE,
v.
CHARLES B. BRADLEY, JR.,
BYRON H. JOHNSON,
ROBERT T. ODELL, JR., and
WILLIAM JAMES HELLIESEN,
DEFENDANTS, APPELLANTS.

DEFENDANTS', APPELLANTS' MOTION FOR ORDER VACATING SENTENCES AND FOR REMAND

Defendants, Appellants move that the sentences herein be vacated and that the cases be remanded to the District Court for resentencing pursuant to Rule 35, Federal Rules of Criminal Procedure.

The grounds of this motion are as follows:

1. Each defendant, appellant was found guilty on May 6, 1971, of violation of 26 U.S.C., § 7237(b) and thereafter adjudged to be guilty as charged and convicted and further it was adjudged that each defendant, appellant be committed to the custody of the Attorney General for a period of five years pursuant to the conditions of 26 U.S.C., § 7237(b) and (d);

2. Under the provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 91-513, certain sentencing alternatives, including probation, suspension of sentence and parole became effective as of May 1, 1971;

3. The District Court imposed illegal sentences upon defendants, appellants in that said Court did not take into account in sentencing defendants, appellants the provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 91-513, insofar as such Act provided the aforesaid sentencing alternatives;

4. Defendants, appellants state that this motion is made in good faith in that the holding of *United States* v. *Stephens*, 449 F.2d 103 (9 Cir., 1971), holds that the sentencing alternatives in P.L. 91-513 are available to defendants sentenced following May 1, 1971, even though convicted of offenses carrying mandatory minimum sentences prior to May 1, 1971.

By their attorneys,

(s) WILLIAM P. HOMANS, JR.
WILLIAM P. HOMANS, JR.
FEATHERSTON, HOMANS & KLUBOCK
45 School Street
Boston, Massachusetts 02108

(s) EDWARD M. ALTMAN
EDWARD M. ALTMAN
678 Massachusetts Avenue
Cambridge, Massachusetts 02139

(s) STANLEY R. LAPON
STANLEY R. LAPON
678 Massachusetts Avenue
Cambridge, Massachusetts 02139

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 71-1186, 71-1187,
71-1188, 71-1189.

UNITED STATES OF AMERICA,
APPELLEE,
v.
CHARLES B. BRADLEY, JR., BYRON H. JOHNSON,
ROBERT T. ODELL, JR., and
WILLIAM JAMES HELLIESEN,
DEFENDANTS, APPELLANTS.

DEFENDANTS', APPELLANTS' MOTION FOR STAY OF MANDATE

Defendants, appellants move that the mandate of this Court be stayed until such time as defendants, appellants shall have been resentenced by the District Court in accordance with defendants, appellants motion for order vacating sentences and for remand filed herewith.

By their attorneys,

(s) WILLIAM P. HOMANS, JR.
WILLIAM P. HOMANS, JR.
FEATHERSTON, HOMANS & KLUBOCK
45 School Street
Boston, Massachusetts 02108

(s) EDWARD M. ALTMAN
EDWARD M. ALTMAN
678 Massachusetts Avenue
Cambridge, Massachusetts 02139

(s) STANLEY R. LAPON
STANLEY R. LAPON
678 Massachusetts Avenue
Cambridge, Massachusetts 02139

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 71-1186, 71-1187,
71-1188, 71-1189.

UNITED STATES OF AMERICA,

APPELLEE,

v.

CHARLES B. BRADLEY, JR.,
BYRON H. JOHNSON,
ROBERT T. ODELL, JR., and
WILLIAM JAMES HELLIESEN,

DEFENDANTS, APPELLANTS.

ON MOTION FOR ORDER VACATING SENTENCES
AND FOR REMAND

March 10, 1972
(Opinion appears in Petition for Writ of Certiorari
at pp. 11-15)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 71-1186.

UNITED STATES OF AMERICA,

APPELLEE,

v.

BYRON H. JOHNSON,

DEFENDANT, APPELLANT.

No. 71-1187.

UNITED STATES OF AMERICA,
APPELLEE,
v.
WILLIAM HELLIESEN,
DEFENDANT, APPELLANT.

No. 71-1188.

UNITED STATES OF AMERICA,
APPELLEE,
v.
CHARLES B. BRADLEY, JR.,
DEFENDANT, APPELLANT.

No. 71-1189.

UNITED STATES OF AMERICA,
APPELLEE,
v.
ROBERT T. ODELL, JR.,
DEFENDANT, APPELLANT.

ORDER OF COURT

Entered March 10, 1972

In accordance with the opinion filed herein today.

It is ordered that the appellants' motion for order vacating sentences and for remand and appellants' motion for stay of mandate pending resentencing be, and they hereby are, denied.

By the Court:
(s) DANA H. GALLUP
Clerk.

Supreme Court of the United States

No. 71-1304 , October Term, 19

James B. Bradley, Jr., et al.,

Petitioners,

v.

United States

ORDER ALLOWING CERTIORARI. Filed June 12 ----------, 19 72.

The petition herein for a writ of certiorari to the United States Court of Appeals for the First ---------- Circuit is granted.

In the
Supreme Court of the United States

OCTOBER TERM, 1971

No.

JAMES B. BRADLEY, JR.,
BYRON H. JOHNSON,
ROBERT T. ODELL, JR., and
WILLIAM JAMES HELLIESEN,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No.

JAMES B. BRADLEY, JR.,
BYRON H. JOHNSON,
ROBERT T. ODELL, JR., and
WILLIAM JAMES HELLIESEN,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners James B. Bradley, Jr., Byron H. Johnson, Robert T. Odell, Jr., and William James Helliesen pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on March 10, 1972.

Citations to Opinion Below

The opinion of the Court of Appeals is not yet reported. A copy of the opinion is attached hereto as Appendix A.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered on March 10, 1972.[1] The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Questions Presented

Petitioners were convicted on May 6, 1971 of conspiracy, prior to May 1, 1971, to violate 26 U.S.C. §§ 4705 (a) and 7237(b), five days following the effective date of repeal (by §1101(b)(4)(A) of Pub. L. 91-513, 84 Stat. 1236) of 26 U.S.C. §7237(d), prohibiting suspension of sentence, grant of probation, or grant of parole to violators of 26 U.S.C. §4705(a). The questions presented are:

1. Whether the sentencing alternatives of suspension of sentence and probation otherwise available to the trial judge under 18 U.S.C. §3651 were made unavailable by §1103(a) of Pub. L. 91-513, 84 Stat. 1236 or by 1 U.S.C. §109.

2. Whether the judgments of convictions of conspiracy to violate 26 U.S.C. §§ 4705(a) and 7237(b) preclude application of 18 U.S.C. §4202 to grant petitioners release on parole during their confinement, if any.

Statutory Provisions Involved

26 U.S.C. §4705(a), 68A Stat. 551.

> It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pur-

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[1] On January 27, 1972, the Court of Appeals affirmed the judgments of conviction. *United States* v. *Bradley, et ali*, —— F.2d ——, (1 Cir., 1972), Dkt. Nos. 71-1186, 71-1187, 71-1188, 71-1189. The question of the sentences was not dealt with. In the instant case, the Court of Appeals "reach[ed] the merits of defendants' motions [for vacation of sentences] by considering it as an append-

suance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate. (repealed, effective May 1, 1971. §§1101(b)(3)(A), Pub. L. 91-513, 84 Stat. 1292; §1105(a), Pub. L. 91-513)

26 U.S.C. §7237, 70 Stat. 568.

(b) Whoever . . . conspires to commit an offense, described in section 4705(a) . . . shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000 . . . .

. . . . . .

(d) Upon conviction — . . .

(2) of any offense the penalty for which is provided in subsection (b) of this section . . .

the imposition or execution of sentence shall not be suspended, probation shall not be granted and in the case of a violation of a law relating to narcotic drugs, section 4202 of title 18, United States Code, and the Act of July 15, 1932 (47 Stat. 696; D.C. Code 24-201 and following), as amended, shall not apply. (repealed, effective May 1, 1971, §1101(b)(4)(A), Pub. L. 91-513, 84 Stat. 1292, §1105(a), Pub. L. 91-513)

Pub. L. 91-513, 84 Stat. 1236 *et seq.*

§1101, 84 Stat. 1292.

(b)(3)(A) Subchapter A of chapter 39 of the Internal Revenue Code of 1954 (relating to narcotic drugs and marihuana) is repealed.

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age to their appeal." *United States* v. *Bradley, et ali*, —— F.2d ——, ——, (1 Cir., 1972), dec. 3/10/72, Dkt. Nos. 71-1186, 71-1187, 71-1188, 71-1189, Slip Op. at 2. A copy of this opinion is appended hereto as Appendix B.

(b)(4)(A) Section [ ] 7237 (relating to violation of laws relating to narcotic drugs and marihuana) . . . of the Internal Revenue Code of 1954 are [is] repealed.

. . . . . .

§1103(a)

Prosecutions for any violation of law occurring prior to the effective date of section 1101 shall not be affected by the repeals or amendments made by such section . . . , or abated by reason thereof.

§1105(a)

Except as otherwise provided in this section, this title shall become effective on the first day of the seventh calendar month that begins after the day immediately preceding the date of enactment.

1 U.S.C. §109, 61 Stat. 633

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability. . . . .

Statement of the Case

Review is sought of the Order dated March 10, 1972 of the United States Court of Appeals for the First Circuit (appended hereto as Appendix A-1) denying petitioners' motions for order vacating sentences and for remand and for stay of mandate pending resentencing in accordance with the court's opinion of the same date, (Appendix A)

which in turn affirmed the sentences as "legally imposed". Petitioners had been sentenced to five years imprisonment each following a jury finding of guilty as to each defendant of conspiracy to violate 26 U.S.C. § 4705(a) by selling cocaine not in pursuance of a written order form, in violation of 26 U.S.C. §7237(b). Petitioners Bradley and Johnson were also charged with substantive violations of 26 U.S.C. §4705(a) and acquitted and all petitioners other than Johnson were found guilty of violation of 18 U.S.C. §924(c)(2). The latter convictions, upon which each petitioner so convicted was sentenced to a suspended sentence of one year's imprisonment are not material to this petition.

The conspiracy for which petitioners were convicted was alleged to have taken place between March 4 and March 12, 1971, prior to May 1, 1971, the effective date of repeal by Pub. L. 91-513 of 26 U.S.C. §§ 4705(a) and 7237(b) and (d), but the trial commenced with impanellment of a jury on May 3, 1971 and concluded with verdicts on May 6, 1971. Petitioners were thereafter sentenced on June 2, 1971.[2] A copy of one of the judgments of conviction and commitments, which is identical in all material respects with each of the other judgments, is appended hereto as Appendix C.

Following affirmance of the convictions on January 27, 1972, (see Appendix B) on February 7, 1972, petitioners filed in the district court, motions for correction of an illegal sentence under Rule 35. The district court took no action upon the motions and directed that pleadings be filed in the Court of Appeals.

Petitioners thereupon filed joint motions with the court of appeals respectively for order vacating sentences and for remand and for stay of mandate. Copies of the motions are appended hereto respectively as Appendices D and E.

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[2] The opinion of March 10, 1972, is incorrect insofar as it states that May 1, 1972 was "five days prior to sentencing". See Appendix A, p. 12.

The motion for vacation alleged that the sentences originally imposed by the district court were illegal in that the district court did not take into account "the provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 91-513, insofar as such Act provided the ... sentencing alternatives" of probation, suspension of sentence and parole, available as of May 1, 1971.

On March 10, 1972, the Court of Appeals entered the order previously referred to, denying petitioners' motion, from which order certiorari is sought, with the accompanying opinion affirming the sentences. The court reached "the merits of [petitioners'] motion by considering it as an appendage to this appeal". Slip opinion, at 2; Appendix A at 11.

Reasons For Granting the Writ

THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ON THE QUESTION OF WHETHER 26 U.S.C. 7237(d) CONTROLS SENTENCING IN SENTENCING PROCEEDINGS FOLLOWING ITS REPEAL ON MAY 1, 1971.

Besides repeal of 26 U.S.C. §4705(a) and 26 U.S.C. §7237(b) by §1103(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 91-513, 21 U.S.C. 176a, governing illegal importation of marihuana, to which, prior to May 1, 1971, 26 U.S.C. §7237(d) applied, was also repealed. The Court of Appeals for the Ninth Circuit held in *United States* v. *Stephens*, 449 F.2d 103, 105 (9 Cir., 1971), that while both §1103(a), the savings clause of P.L. 91-513, and 1 U.S.C. §109, the general savings clause, precluded "abatement of proceedings under §176a", neither savings statute rendered ineffective the repeal by P.L. 91-513 of 26 U.S.C. §7237(d).

The First Circuit, however, in the instant case held

"that narcotics offenses committed prior to May 1, 1971 are to be punished according to the law in force at the time of the offense. In the instant case, this conclusion requires the continuing application of §§7237(b) and (d)." *United States* v. *Bradley*, Slip Op., at 3-4, Appendix A at 13. The First Circuit expressly disagreed with the holding in *Stephens*, *id.*

As to the application of §1103(a) of P.L. 91-513, the First Circuit reasoned that sentence and "the manner of sentencing", (Appendix A at 14) are part of "prosecution" and that therefore §1103(a) maintained 26 U.S.C. §7237(d) in force, even though sentencing took place after May 1, 1971.

The Ninth Circuit. on the other hand, found "[t]he purpose of [§1103(a) to have been] served when judgment under the old Act has been entered and abatement of proceedings has been avoided. At that point litigation has ended and appeal is available. *Korematsu* v. *United States*, 319 U.S. 432 (1943)." *United States* v. *Stephens*, 449 F.2d 103, 105 (9 Cir., 1971)

With respect to 1 U.S.C. §109, while the Ninth Circuit reasoned that since "repeal of §7237(d) poses no threat to abatement" and "does not wipe clean the defendant's penal obligation, 1 U.S.C. §109 was not intended to keep the prohibition in 26 U.S.C. §7237(d) alive following repeal," (*id.*, at 106) the First Circuit did not find 1 U.S.C. §109 so limited. "It [§109] refers unambiguously to 'any statute', whether that statute defines a crime, prescribes a penalty, or elaborates on the nature of the penalty to be imposed." Appendix A, at 15.

Petitioners submit that the approach and holding of the *Stephens* case is consistent with the purposes of §1103(a) of P.L. 91-513, as well as with the purposes of 1 U.S.C. §109.

This Court in *Korematsu* v. *United States*, 319 U.S. 432, 435 (1943), upon which the Ninth Circuit relied in *United*

States v. *Stephens*, 449 F.2d 103, 105 (9 Cir., 1971), distinguished, conceptually as well as chronologically, between "litigation 'on the merits'" on the one hand and the chronologically later "institution of disciplinary measures", *Korematsu* v. *United States*, *supra*, at 435. Petitioners submit that the court in *Stephens* was correct in holding that the "prosecution", for the purposes of §1103(a), was synonymous with "litigation 'on the merits'" and that prosecution ends with termination of the litigation by a determination of guilt.

It seems clear, moreover, that a sentencing court has power, having sentenced, to suspend the sentence *thereafter* and to place the defendant on probation, under 18 U.S.C. §3651, so long as the defendant has not commenced execution of his sentence. *Affronti* v. *United States*, 350 U.S. 79, 82 (1955); *United States* v. *Murray*, 275 U.S. 347, 356-358 (1928); *United States* v. *Ellenbogen*, 390 F.2d 537, 541 (2 Cir., 1968). The prosecution will have ended, at the latest, with the imposition of sentence and would not be affected by the later order under 18 U.S.C. §3651. The distinction is maintained "between the conviction and certainty of punishment, on the one hand, and the public disgrace of incarceration and evil association, on the other." *United States* v. *Murray*, 275 U.S. 347, 357 (1928). The goals of "prosecution" have been met. "Prosecution for crimes is but an application or enforcement of the law . . ." (*United States* v. *Chambers*, 291 U.S. 217, 226 (1934)) and the law is no less applied or enforced because a sentence validly imposed is thereupon or thereafter suspended, or because a sentenced and imprisoned defendant is later paroled.

As to the application of 1 U.S.C. §109, the reasoning of the Ninth Circuit in *United States* v. *Stephens*, 449 F.2d 103, 105 (9 Cir., 1971), is persuasive. The right of the Government to prosecute under 21 U.S.C. §176a in that

case, and under 26 U.S.C. §4705(a) in this case, and the liability of the defendants in each case to prosecution for this conduct, prior to May 1, 1971, remained unabated by the repeal effected by §1101 of Pub. L. 91-513. 1 U.S.C. §109 has saved this right and this liability from "technical" abatement. See *Hamm* v. *City of Rock Hill*, 379 U.S. 306, 314 (1964). The penalty which might be incurred was defined in the *Stephens* case by 21 U.S.C. §176a and in the instant case by 26 U.S.C. §7237(b), as a minimum term of imprisonment of five years and a maximum of twenty years. Those penalties remain unchanged by §1101 of Pub. L. 91-513, by virtue of 1 U.S.C. §109. The repeal has not abated the imposition of discipline (see *Korematsu* v. *United States*, 319 U.S. 432, 434 (1943)) but merely reinstated the power of the respective courts to act under 18 U.S.C. §3651 to suspend these sentences upon or after their imposition and the power of the executive at a later time, if execution of a sentence of imprisonment is not suspended, to release upon parole under 18 U.S.C. §§4202 and 4203.

The existence of a conflict between the decisions of two courts of appeal as to matters having to do with suspension of sentence and probation has in the past justified the granting of certiorari by this Court. *Affronti* v. *United States*, 350 U.S. 79, 80 (1955). Here, it may be expected that the questions presented by this petition and by the conflict between courts of appeal herein recited may recur, not only as presented here, but in the context of petitions under 28 U.S.C. §2255 by federal prisoners (1) who contend that sentencing judges improperly restricted their sentencing discretion, or (2) who contend that they are illegally precluded from applying for release on parole under 18 U.S.C. §4202.

It is respectfully submitted that the conflict between the United States Court of Appeals for the First Circuit and

the United States Court of Appeals for the Ninth Circuit justifies the grant of certiorari to review the order and judgment below.

Conclusion

For the reasons above stated, a writ of certiorari should issue to review the order, judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

Nos. 71-1186, 71-1187,
71-1188, 71-1189.

UNITED STATES OF AMERICA,
APPELLEE,
v.
JAMES B. BRADLEY, JR.,
BYRON H. JOHNSON,
ROBERT T. ODELL, JR., and
WILLIAM JAMES HELLIESEN,
DEFENDANTS, APPELLANTS.

ON MOTION FOR ORDER VACATING SENTENCES AND ON REMAND

Before ALDRICH, *Chief Judge*,
BREITENSTEIN, *Senior Circuit Judge*,*
and MCENTEE, *Circuit Judge*.

March 10, 1972

MCENTEE, *Circuit Judge*. Following the affirmance of their convictions on appeal, *United States* v. *Bradley*, Nos. 71-1186-1189 (1st Cir. Jan. 27, 1972), the defendants jointly moved in this court for vacation of sentences pursuant to Rule 35, Fed.R.Crim.P. Although, as the government correctly contends, Rule 35 motions are properly directed in the first instance to the district court, we reach the merits of defendants' motion by considering it as an appendage to their appeal.

* Of the Tenth Circuit, sitting by designation.

Defendants allege that the district court sentenced them under the terms of a statute no longer in force. The chronology of relevant events can be simply stated. In March 1971 the four defendants conspired to violate 26 U.S.C. § 4705(a) by selling cocaine not in pursuance of a written order form, in violation of 26 U.S.C. §7237(b). A jury found them guilty of this offense on May 6, 1971, and the court sentenced each defendant to a five year term, the minimum punishment for first offenders under § 7237(b). Pursuant to § 7237(d), these sentences could not be suspended, nor could parole or probation be granted. On May 1, 1971, five days prior to sentencing, most of the existing federal narcotics laws, including §§ 4705(a), 7237(b) and 7237(d), were repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1242 *et seq.*, 21 U.S.C. §§ 801 *et seq.* The 1970 Act redefined the substantive offenses and generally liberalized the penalty provisions, in most instances no longer forbidding suspended sentences, parole, or probation. The defendants argue that since the 1970 Act was in force when they were sentenced, the court should not have felt constrained by § 7237(d), but should have considered the above sentencing alternatives. We disagree.

Whether a repealed provision remains in force as to pre-repeal activities is a matter of Congressional intent to be determined from statutory saving provisions. The general saving provision, 1 U.S.C. § 109, was originally enacted in 1871 in reaction to the common law holding in *United States v. Tynen*, 78 U.S. 88 (1871) that the repeal of a penalty provision totally abated the prosecutions of pre-repeal offenders. The statute provides, in pertinent part:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing

> Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

In *United States* v. *Reisinger*, 128 U.S. 398, 402 (1888), the Supreme Court held that the words "penalty," "forfeiture," and "liability" apply to criminal offenses *and the punishment therefor*.[1] Thus, unless the repealing statute explicitly provides otherwise, the repeal of a criminal statute neither abates the underlying offense nor affects its attendant penalties with respect to acts committed prior to repeal.[2]

F.2d 312, 315-18 (4th Cir.), *cert. denied*, 338 U.S. 834 (1949).

We find no express, or even implied, indication in the 1970 Act that Congress intended that prior offenders not be sentenced under the pre-existing penalty provisions. To the contrary, § 1103(a), the specific saving provision of Pub. L. 91-513, states:

> "Prosecutions for any violation of law occurring prior to the effective date of section 1101 shall not be affected by the repeals or amendments made by such section or section 1102, or abated by reason thereof."

Reading this section of the 1970 Act against the background of § 109, we hold that narcotics offenses committed prior to May 1, 1971, are to be punished according to the law in force at the time of the offense. In the instant case, this conclusion requires the continuing application of §§ 7327(b) and (d).

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[1] See also the elaborate discussion in *United States* v. *Lovely*, 175

[2] *See Moorehead* v. *Hunter*, 198 F.2d 52 (10th Cir. 1952). For other instances where enforcement proceedings survived a statute's repeal due to the general saving provision, *see, e.g., Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535 (1954); *De La Rama Steamship Co.* v. *United States*, 344 U.S. 386 (1953); *United States* v. *Carter*, 171 F.2d 530 (5th Cir. 1948).

The defendants rely on the recent case of *United States* v. *Stephens*, 449 F.2d 103 (9th Cir. 1971), which involved a similar chronological sequence but reached the opposite conclusion with respect to § 7237(d). In *Stephens* the defendants were prosecuted and convicted for violations of 21 U.S.C. § 176(a)[3] and on May 24, 1971, received five year sentences, the minimum prescribed by § 176(a). These sentences, however, were then suspended and each defendant was placed on probation for five years. The Ninth Circuit, denying mandamus against the trial judge, held that the suspension of sentence and the grant of probation were authorized by the terms of the 1970 Act. The court concluded, after examining the specific and general statutory saving provisions, that neither preserved § 7237(d).

With respect to § 1103(a) of Pub. L. 91-513, relying on *Korematsu* v. *United States*, 319 U.S. 432 (1943), the Ninth Circuit held that "prosecutions" end with the determination of guilt and that the manner of sentencing in no way affects the prosecution of a case. *Korematsu* leads us to precisely the opposite conclusion. That case involved the finality, for purposes of appeal, of an order placing a defendant on probation after his conviction without first having formally sentenced him. The Court, citing *Berman* v. *United States*, 302 U.S. 211 (1937), held that the order was final since it "terminate[d] the litigation . . . on the merits" and [*left*] *nothing to be done but to enforce by execution what ha*[*d*] *been determined*" (emphasis added). In *Korematsu* there was both a determination of guilt and imposition of disciplinary measures; no further court order was anticipated. In both *Stephens* and the instant case, until the sentences had been determined the proceedings had not reached a comparable state of finality. Where sentence is imposed as noted in *Berman* v. *United States*, *supra* at 212, "[f]inal judgment in a criminal case means sentence. The sentence is the judgment." We cannot agree, therefore, even reading

[3] 21 U.S.C. § 176(a) was repealed by the 1970 Act.

§ 1103(a) *in vacuo,* that "prosecution" excludes and is unaffected by sentencing. Our conclusion is strengthened when § 1103(a) is read against the background of § 109, which specifically mentions penalties and liabilities and which requires *express* statutory provisions to counteract its saving effect.

The court in *Stephens,* however, did not read the two sections together because it held that § 109 was inapplicable to the repeal of §7237(d). Noting that § 109 was designed to obviate "mere technical abatement," the court concluded it did not apply to a provision like § 7237(d), the repeal of which did not threaten abatement of a substantive prosecution. We do not agree that § 109 is limited to those statutes the repeal of which, at common law, would have abated a cause of action or prosecution.[4] Although designed to avoid technical abatement, the statute is not limited to that situation. It refers unambiguously to "any statute," whether that statute defines a crime, prescribes a penalty, or elaborates on the nature of the penalty to be imposed. Section 7237(d) was part of the "liability incurred" by violation of § 7237(b). That is, had trial and sentencing been simultaneous with the offense, the defendants herein clearly would have been ineligible for suspended sentences, parole, or probation. Regardless of whether the legislative grant or these sentencing alternatives is viewed as a release of penalty,[5] under the mandate of § 109 the repealed statute, § 7237(d) is "to be treated as still remaining in force."

The sentences having been legally imposed, they are hereby affirmed.[6]

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[4] Nor do we find it so clear, as did the Ninth Circuit, that the repeal of § 7237(d) would not have abated prosecutions at common law.

[5] In an independent argument on the inapplicability of § 109 to the repeal of § 7237(d), the *Stephens* court contends that the grant of probation neither extinguishes nor releases a penal obligation.

[6] Since sending this case to the printer our attention has been called to a similar holding in *United States* v. *Fiotto, et al,* 2 Cir., 1/4/72.

APPENDIX A-1

United States Court of Appeals
For the First Circuit

No. 71-1186.

UNITED STATES OF AMERICA,
APPELLEE,
v.
BYRON H. JOHNSON,
DEFENDANT, APPELLANT.

No. 71-1187.

UNITED STATES OF AMERICA,
APPELLEE,
v.
WILLIAM HELLIESEN,
DEFENDANT, APPELLANT.

No. 71-1188.

UNITED STATES OF AMERICA,
APPELLEE,
v.
CHARLES B. BRADLEY, JR.,
DEFENDANT, APPELLANT.

No. 71-1189.

UNITED STATES OF AMERICA,
APPELLEE,
v.
ROBERT T. ODELL, JR.,
DEFENDANT, APPELLANT.

ORDER OF COURT

Entered March 10, 1972

In accordance with the opinion filed herein today,

It is ordered that the appellants' motion for order vacating sentences and for remand and appellants' motion for stay of mandate pending resentencing be, and they hereby are, denied.

By the Court:

(s) DANA H. GALLUP

Clerk.

APPENDIX B

United States Court of Appeals
For the First Circuit

Nos. 71-1186, 71-1187,
71-1188, 71-1189.

UNITED STATES OF AMERICA,
APPELLEE,

v.

JAMES B. BRADLEY, JR.,
BYRON H. JOHNSON,
ROBERT T. ODELL, JR., and
WILLIAM JAMES HELLIESEN,
DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
BREITENSTEIN, *Senior Circuit Judge*,*
and MCENTEE, *Circuit Judge*.

January 27, 1972

MCENTEE, *Circuit Judge*. This is the consolidated appeal of four defendants, Bradley, Johnson, Odell, and Helliesen, who were tried together before a jury on a six-count indictment. All were found guilty of conspiracy to sell a narcotic drug not in pursuance of a written order[1] (Count 1). All

* Of the Tenth Circuit, sitting by designation.

[1] In violation of 26 U.S.C. § 7237(b). Repealed Pub. L. 91-513, § 1101(b) (4) (A), October 27, 1970, 84 Stat. 1292, effective date of repeal being May 1, 1971, Pub. L. 91-513, § 1105(a). Defend-

but defendant Johnson were charged with and convicted of carrying firearms during the commission of a felony[2] (Counts 4, 5, and 6). Defendants Johnson and Bradley were also charged with selling cocaine[3] (Counts 2 and 3), but the jury acquitted them on those two counts. The defendants urge reversal of their convictions on a number of grounds, generally attacking the legality of arrests and searches, the sufficiency of the government's evidence, and the conspiracy instructions given by the trial judge.

The case involves a proposed narcotics transaction between the defendants and federal undercover narcotics agents. The agents, through an informer named Arthur Motsis,[4] contacted defendant Bradley, who said he could arrange for the sale to them of one and a half pounds of cocaine. Preparations for this transaction began on March 4, 1971, and continued until March 12. On that day, at approximately 9:29 p.m., Motsis and Agents Egan and Ross went to the first floor apartment at 73 Magazine Street, Cambridge, Massachusetts. Bradley apparently alone in apartment, admitted them,[5] and five minutes later these four went outside to the agents' car to count the money. Bradley stated that the price was $9,500, which was $500 more than the agents had with them. The agents and Motsis then left to get the extra money, and returned at approximately 11:05 p.m.

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anta each were sentenced to five year prison terms, the minimum sentence under 26 U.S.C. § 7237(b).

[2] In violation of 18 U.S.C. § 924(c) (2). Each received a one year suspended sentence and was placed on probation for three years, to be served on and after the five year sentence.

[3] In violation of 26 U.S.C. § 4705(a). Repealed Pub. L. 91-513, § 1101(b) (3) (A), October 27, 1970, 84 Stat. 1292; effective date of repeal being May 1, 1971, Pub. L. 91-513 § 1105(a).

[4] Motsis was named in Count 1 as a co-conspirator but not as a defendant.

[5] It was necessary to go through three doors to enter the apartment. The outer door to the building was closed but unlocked. Next was the foyer door, which operated on a buzzer lock system. In a direct line with these two doors was the door to the apartment itself.

Upon their return, the agents and the informer were admitted by defendant Odell, and within the next few minutes all the defendants were present in the apartment. In the course of conversation, Bradley admitted that he had a gun. Defendant Johnson produced a sample of the cocaine in a tinfoil packet, which was placed on a scale by Agent Egan. Each of the defendants sampled a bit of the cocaine, which remained on the scale after this sampling. Several minutes later, defendants Johnson, Helliesen, and Bradley left the apartment. Johnson and Helliessen were to get the main supply of cocaine from their car; Bradley apparently just drifted out to the courtyard of the apartment building. Agent Egan and informer Motsis left to get the money from the government vehicle; Agent Ross remained in the apartment with Odell.

After a quick drive around the block to check the area, Johnson and Helliesen exited from their car and started toward the apartment. Johnson was carrying a flight bag later determined to contain sixteen plastic bags of cocaine. Motsis remained in the government car, and Egan followed Johnson and Helliesen from the street to the apartment building. A ten-man government surveillance team was in the immediate vicinity.

It is at this point, the time of re-entry into the apartment building at 11:35, that the evidence adduced at the pre-trial hearing on defendants' motion to suppress becomes contradictory. Agent Egan testified that Johnson and Helliesen preceded him through the unlocked outer door, at which time Odell opened the apartment door and saw them standing there. Odell buzzed open the foyer door, and Johnson, Helliesen and Egan entered. Egan stated that when the foyer door was opened, Agent Maloney was a few steps behind him, followed by the rest of the surveillance team. Agent Ross, who was inside the apartment with Odell discussing the pending sale, testified that Odell opened the

apartment door, looked out, and then buzzed open the foyer door. Helliesen and Johnson entered, followed by Egan and then the surveillance team. Johnson, Helliesen, and Odell were arrested immediately. A third agent testified that he peaceably arrested Bradley on the steps outside the apartment building after Egan had passed through the foyer door. Bradley, however, testified that Helliesen and Johnson were totally inside the apartment when Egan and the other agents ran up to the apartment building, grabbed Bradley, opened the unlocked outer door, and then shoved Bradley against the foyer door, causing the lock to break and spring open. Bradley did not recall how the apartment door was opened. Odell testified that while in the apartment with Johnson and Helliesen he heard a loud bang from the direction of the foyer door, and seconds later the apartment door was opened from the outside and about ten agents streamed in.

Based on this evidence the court found that the entry was not by force, Odell having voluntarily buzzed open the foyer door and opened the apartment door. The trial judge further found that any delay in order to obtain a warrant or any announcement of authority and purpose would likely have permitted the destruction of evidence. It therefore ruled that the arrests were legal and denied the motions to suppress.[6]

Defendants challenge the legality of the arrests on several grounds, the first being that they violated 18 U.S.C. § 3109.[7]

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[6] The defendants sought to suppress the cocaine found in the flight bag and the sample of cocaine found on the scales in the apartment, as well as the firearms found incident to arrest.

[7] 18 U.S.C. § 3109 provides:

"The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

This statute is applicable to the entry of federal officers, *Sabbath* v. *United States*, 391 U.S. 585, 588-89 (1968),[8] and its standards apply to entry to execute a warrantless arrest, *Miller* v. *United States*, 357 U.S. 301, 306 (1958). Defendants' contention that the agents employed force to enter at 11:35 is without merit, since the finding of no force by the trial court, which was far from "clearly erroneous," is binding on this court. Nor was the court obligated to reverse its ruling or reopen the hearing when evidence adduced at the trial allegedly contradicted the pre-trial evidence.[9] The court did not refuse to consider the evidence, *cf. Rouse* v. *United States*, 359 F. 2d 1014 (D.C. Cir. 1966), but reasonably believed that it did not compel a different finding.[10] There was no abuse of discretion in not conducting a further hearing on the matter.

Defendants contend that, notwithstanding the absence of force, 18 U.S.C. § 3109 was violated by use of a ruse.[11]

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[8] This court's decision in *Jackson* v. *United States*, 354 F. 2d 980 (1st Cir. 1965) is not to the contrary. In that case the entry was made simultaneously by both state and federal officials. State law governs the arrest by state officials for federal offenses, *Ker* v. *California*, 374 U.S. 23 (1963), but where only federal officials are involved, federal law is controlling, *Sabbath*, *supra*.

[9] Agent Lambert, a member of the surveillance team, testified that he watched the 11:35 entry from approximately seventy-five yards away with the aid of field glasses. Lambert saw Johnson, Hellieson, and Egan approaching the apartment building, and then his vision was obstructed. The next time Lambert saw Egan, the latter was about to enter the outer door, and Johnson and Hellieson were not in sight. The defendants contend this is consistent with the pre-trial testimony of Bradley and Odell that Johnson and Hellieson entered the apartment a considerable time before Egan entered. It is not, however, inconsistent with the agents' testimony that Johnson and Hellieson merely preceded Egan through the outer door.

[10] "The Court: I agree there is additional testimony but it does not change my view of the ultimate facts."

[11] The ruse is alleged to have occurred at 11:35 when Egan entered the apartment as an undercover agent *for the purpose of arrest*. The defendants argue that the agent's purpose sufficiently distinguishes the situation from *Lewis* v. *United States*, 385 U.S. 206 (1966), where the undercover agent entered for the very purposes contemplated by the occupant.

While a physical breaking is not required for a § 3109 violation, *Sabbath* v. *United States, supra*, the Supreme Court has expressly reserved the question of a ruse. *Id.* at 590, n. 7. Since *Sabbath*, the lower federal courts have spoken variously on the question,[12] and this court has not yet passed on it. While the matter is of substantial importance, we do not reach the question in this case due to the prior lawful entry of Agent Ross.[13]

When Agent Egan and the surveillance team entered at 11:35 on March 12, Agent Ross was already inside the apartment. His entry at 11:05 with Egan was clearly lawful. As in *Lewis* v. *United States, supra* note 11, the agents were invited into the apartment for the purpose of executing a felonious sale of narcotics, and the defendants' only concern was that the agents were willing purchasers, which they were. Following the lawful entry, Agent Ross remained in the apartment. The defendants do not allege, nor could they, that Ross' presence suddenly became unlawful or that their privacy suddenly was invaded solely because his role changed from undercover agent to arresting officer. To so hold, as was stated in *Lewis* v. *United States, supra* at 210, would "come near to a rule that the use of undercover agents in any manner is virtually unconstitutional *per se*."

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[12] For post-*Sabbath* decisions on the issue, *see, e.g.*, *United States* v. *Beale*, 445 F. 2d 977 (5th Cir. 1971) (ruse does not violate § 3109) (but see Tuttle, J., dissenting); *United States* v. *Harris*, 435 F. 2d 74 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 986 (1971) (ruse violates § 3109); *United States* v. *Syler*, 430 F. 2d 68 (7th Cir. 1970) (ruse does not violate § 3109); *Ponce* v. *Craven*, 409 F. 2d 621 (9th Cir. 1969), *cert. denied*, 397 U.S. 1012 (1970) (ruse does not violate analogous state statute); *Bowers* v. *Coiner*, 309 F. Supp. 1064 (S.D. W.Va. 1970) (ruse violates § 3109); *United States* v. *Burruss*, 306 F. Supp. 915 (E.D. Pa. 1969) (implies but does not decide that ruse violates § 3109).

[13] Nor need we reach the questions of whether the action of the federal agents constitutes a ruse, *see* note 11 *supra*, or whether exigent circumstances warrant an exception to § 3109, *see generally* *Sabbath* v. *United States*, *supra* at 591 n. 8; *Ker* v. *California*, *supra* note 8; *Johnson* v. *United States*, 333 U.S. 10 (1948).

The lawful presence of a government agent precludes any argument that later entries violate the privacy of occupants. Since privacy is what § 3109 seeks to protect, the prior lawful entry and continued presence of Agent Ross vitiates any impropriety of subsequent entries. *See United States* v. *Marson*, 408 F. 2d 644 (4th Cir. 1968), *cert. denied*, 393 U.S. 1056 (1969); *Cognetta* v. *United States*, 313 F. 2d 870 (9th Cir. 1963); *United States* v. *Viale*, 312 F. 2d 595 (2d Cir.), *cert. denied*, 373 U.S. 903 (1963).

The defendants raise several objections to the searches apart from the alleged violation of § 3109. In that probable cause existed to arrest Johnson and Hellieson as they approached the apartment building, defendants argue that those arrests were unlawfully delayed to afford an opportunity to search the premises incident to arrest. However, any interior search incident to arrest could have been carried out with regard to Odell; and nothing was seized as a result of the delay which would not have been seized had Johnson and Helliesen been arrested outside. As we stated in *United States* v. *Berkowitz*, 429 F. 2d 921, 926 (1st Cir. 1970), "[w]e are unaware of any right of a defendant to be arrested at a particular time." There is absolutely no indication that the primary purpose of any momentary delay was to allow a search inside the apartment.[14] *Cf. McKnight* v. *United States*, 183 F. 2d 977 (D.C. Cir. 1950).

Defendants also claim that the search and seizure of the flight bag containing cocaine violated the doctrine of *Chimel* v. *California*, 395 U.S. 752 (1969).[15] Agent Egan testified

[14] Government evidence established that the arrests were made inside pursuant to a pre-arranged plan to keep potential gun play at a minimum.

[15] In *Chimel* police officers arrested the petitioner in his home and incident to that arrest searched his entire three-bedroom house, including attic, garage, and workshop, and caused his bureau drawers to be opened and searched. Condemning this search as unreasonable under the fourth amendment, the Court held that the scope of a search incident to arrest should be limited to the person and the area from which he could obtain a weapon or inculpatory evidence.

that as Johnson was being placed under arrest in one room of the apartment, he threw the flight bag into the next room. The bag was within Johnson's control at the instant of arrest, and remained in plain view thereafter, thus giving rise to a *duty* to seize it. *United States* v. *Palmer*, 435 F. 2d 653, 655 (1st Cir. 1970). *Chimel* prohibited general exploratory searches incident to arrest but did not erect impenetrable barriers at every doorway.

The final search and seizure claim, that entry without warrant was unjustified, is also without merit. Prior to the 11:05 meeting, the agents knew the identity of only one of the conspirators and did not know where the cocaine was located. In fact, the 11:05 meeting was not definitely arranged until about 10:35 that evening. The surveillance team was positioned in the area apparently on the hunch that the transaction would be completed there. This situation does not approach that of *Niro* v. *United States*, 388 F. 2d 535 (1st Cir. 1968), where the agents could have affected the arrests twelve hours before they did so and inexcusably neglected to obtain warrants during the interim. Once the transaction herein started to unfold, it was obvious that delay in order to obtain warrants would have permitted the destruction of evidence and the escape of suspects, and might have increased the level of potential danger. Such exigencies override the general requirement of a warrant. *See, e.g., Ker* v. *California*, *supra* note 8; *Dorman* v. *United States*, 435 F. 2d 385 (D.C. Cir. 1970) (*en banc*).

With regard to the conspiracy convictions, the defendants challenge both the sufficiency of the evidence and the jury instructions on the issue of intent. Count 1 of the indictment charged a conspiracy to violate 26 U.S.C. § 4705(a), selling a narcotic drug not in pursuance of a written treasury order form.[20] Defendants argue that proof of their knowl-

[20] 26 U.S.C. § 4705(a) provides:

"(a) *General requirement.*—It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs

edge of and intent not to obtain the Treasury forms is requisite to a conviction for conspiracy.

While it is of course true that conviction of a conspiracy to transfer narcotics in violation of 26 U.S.C. § 4705(a), unlike the substantive offense, may not be sustained without proof of specific intent,[17] the defendants are incorrect in asserting that actual knowledge of the order form requirement was an essential element of the government's case. The essence of the jury's task in deciding here whether the defendants were guilty of participation in an illegal conspiracy involved determining, first, whether the object of the conspiracy constituted a substantive offense; second, whether in agreeing to work in concert the defendants knew or should have known that the specific object of the agreement was unlawful; and, third, whether one or more of the defendants acted in furtherance of the agreement. *See, e.g., United States* v. *Falcone*, 311 U.S. 205, 210 (1940). To find the requisite *mens rea*, the jury need not have found that the defendants actually knew that the statute did not penalize narcotics transferred pursuant to a treasury form issued for that purpose but need only have found beyond a reasonable doubt that the defendants thought that what they had

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except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

[17] The Supreme Court, construing the part of § 2 of the Harrison Narcotic Act of 1914, on which 26 U.S.C. § 4705(a) is based, held that the substantive offense did not require a showing of specific intent. *United States* v. *Balint*, 258 U.S. 250 (1922). This decision has been cited with approval since the passage of § 4705 (a), *United States* v. *Wiesenfeld Warehouse Co.*, 376 U.S. 86 (1964), and has been specifically applied to that section, *United States* v. *Jones*, 438 F. 2d 461, 466 (7th Cir. 1971). This court's discussion in *United States* v. *Goldman*, No. 71-1042 (1st Cir., Nov. 9, 1971) of a defense of lack of knowledge that pills were narcotic is not to be read as contrary to the proposition that no specific intent is required under 26 U.S.C. § 4705(a).

agreed to do was illegal and that it was illegal in fact.[18] *Cf. Nelson* v. *United States*, 415 F. 2d 482, 486-87 (5th Cir. 1969), *cert. denied*, 396 U.S. 1060 (1970); *Nassif* v. *United States*, 370 F. 2d 147, 151-53 (1966); *Hanis* v. *United States*, 246 F. 2d 781, 786-88 (8th Cir. 1957). The court's general instructions to the jury were adequate on this point and the court properly refused the alternative submitted by the defendants.[19]

As to defendants' charge that the government's evidence was insufficient to establish that they had conspired with a specific intent to transfer narcotic drugs illegally, there was abundant evidence—to which the jury apparently attached conclusive weight—that the events leading up to the final sale and the transfer of the "sample" cocaine took place

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[18] As we noted in our recent opinion in *United States* v. *Medina*, —— F. 2d —— (1st Cir. 1971), the federal narcotics statute explicitly relieves the government of any responsibility for proving as part of its case-in-chief that a sale of narcotics, had it been completed, would not have been accompanied by an order form. 26 U.S.C. § 4724(c). Whether use of an order form is contemplated is a fact peculiarly within the knowledge of the accused and is available as an affirmative defense. *Cf. United States* v. *Fleischman*, 339 U.S. 349, 359-64 (1950). The fact that in response to the government's claim of an illegal intent defendants would have had to show that they intended to use an order form should not mean that the government's own proof need be that specific.

[19] Defendants' jointly submitted instructions Nos. 8 and 9 were:

"8. Likewise, with respect to Count 1, you may not find the specific intent necessary to convict a defendant under Count 1, unless you find beyond a reasonable doubt that it was an object of the conspiracy in which a defendant may be found to have participated that a narcotic drug would be sold, bartered, exchanged or given away not in pursuance of a written order of the person to whom such narcotic was to be sold, bartered, exchanged or given away on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate, and that knowing of the requirement of such written order, such defendant participated in the alleged conspiracy with the intent that such form not be obtained.

"9. The specific intent necessary for a guilty verdict is the awareness by the defendant or the existence of all those facts which make his conduct criminal. *United States* v. *Crimmins*, 123 F. 2d 271 (2 Cir., 1941)."

under the most clandestine of circumstances. The defendants took great care to assure themselves that they were not dealing with federal agents and numerous statements by the defendants indicated knowledge on their part that the contemplated sale was illegal. The jury was entitled to infer from this circumstantial evidence that the defendants specifically intended with full knowledge of illegality to transfer narcotics in violation of 26 U.S.C. § 4705(a). *United States* v. *Vasquez*, 429 F. 2d 615 (1970). *See also Ingram* v. *United States*, 360 U.S. 672, 679 (1959); *Screws* v. *United States*, 325 U.S. 91, 106 (1945); *Direct Sales Co.* v. *United States*, 319 U.S. 703 (1943); *In re Coy*, 127 U.S. 731, 753 (1888); *Developments in the Law, Criminal Conspiracy*, 72 Harv. L. Rev. 920, 936-40 (1959).

Defendants' final contention is that the court's failure to give a requested conspiracy instruction was reversible error. The requested charge arguably combines the elements of individual participation and proof of a conspiracy independent of hearsay statements.[20] The district court did give correct instructions on each of these aspects of conspiracy. It stated that to be a conspirator "one must knowingly participate in the conspiracy intending to further its purposes," and described at length how one might be such a participant. With respect to the independent proof of the conspiracy, until a *prima facie* case of conspiracy was established the court limited all hearsay statements to the one who made them. Once a *prima facie* case was presented, the court gave more extensive instructions on the need for proof

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[20] Defendants' requested instruction was as follows:

"3. The existence of a conspiracy cannot be established as against an alleged conspirator by evidence of the actions and declarations of his alleged co-conspirators, made in his absence. Such acts and declarations are admissible against him only when there is other proof of his connection with a conspiracy. *Glasser* v. *United States*, 315 U.S. 60, 75 (1942); *Perina* v. *United States*, 308 F. 2d 98, 104-105 (8 Cir., 1962)."

of the conspiracy independent of hearsay declarations.[21] Especially in view of the substantial independent evidence of the conspiracy, it was not reversible error not to repeat this instruction in the final charge to the jury.

Affirmed.

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[21] The Court:

"Now if you do by the evidence already here or hereafter submitted conclude that there was in fact such a conspiracy then the statements of any one of the co-conspirators are admissible against the other co-conspirators but you must determine by independent evidence, not by the statements themselves, as to whether there is a conspiracy."

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

Cr. No. 71-147-W

UNITED STATES OF AMERICA

v.

CHARLES B. BRADLEY, JR.

On this 2nd day of June, 1971 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant upon his pleas of not guilty as to counts 1, 3, and 4, and verdicts of guilty as to counts 1, 4, and not guilty as to count 3, has been convicted of the offenses of violations of Title 26, U.S.C., Section 7237(b) in that he did wilfully conspire with other persons to commit an offense against the United States, that is, to sell a narcotic drug (cocaine) not in pursuance of a written order on a form issued in blank by the Secretary of the Treasury; and Title 18, U.S.C., Section 924 (c)(2) in that he did wilfully, knowingly and unlawfully carry a firearm during the commission of a felony which may be prosecuted in a court of the United States,

as charged in an Indictment

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized

representative for imprisonment for a period of five (5) years on count 1. The Court directs that defendant be given credit for the six (6) days he has already spent in custody from March 12, 1971 through March 17, 1971.

And on count 4, defendant be imprisoned for a period of one (1) year, said prison sentence to be served on and after the sentence imposed on count 1; said prison sentence is suspended, and defendant is placed on probation for a period of three (3) years.

IT IS ADJUDGED that both sentences are stayed pending appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the Deputy United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

(s) C. WYZANSKI
United States District Judge.

(s) RUSSELL H. PECK
Clerk.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Nos. 71-1186, 71-1187,
71-1188, 71-1189.

UNITED STATES OF AMERICA,
APPELLEE,
v.
CHARLES B. BRADLEY, JR.,
BYRON H. JOHNSON,
ROBERT T. ODELL, JR., and
WILLIAM JAMES HELLIESEN,
DEFENDANTS, APPELLANTS.

DEFENDANTS', APPELLANTS' MOTION FOR ORDER VACATING SENTENCES AND FOR REMAND

Defendants, Appellants move that the sentences herein be vacated and that the cases be remanded to the District Court for resentencing pursuant to Rule 35, Federal Rules of Criminal Procedure.

The grounds of this motion are as follows:

1. Each defendant, appellant was found guilty on May 6, 1971, of violation of 26 U.S.C., § 7237(b) and thereafter adjudged to be guilty as charged and convicted and further it was adjudged that each defendant, appellant be committed to the custody of the Attorney General for a period of five years pursuant to the conditions of 26 U.S.C., §7237(b) and (d);

2. Under the provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 91-513, certain sentencing alternatives, including probation, suspension of sentence and parole became effective as of May 1, 1971;

3. The District Court imposed illegal sentences upon defendants, appellants in that said Court did not take into account in sentencing defendants, appellants the provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 91-513, insofar as such Act provided the aforesaid sentencing alternatives;

4. Defendants, appellants state that this motion is made in good faith in that the holding of *United States* v. *Stephens*, 449 F.2d 103 (9 Cir., 1971), holds that the sentencing alternatives in P.L. 91-513 are available to defendants sentenced following May 1, 1971, even though convicted of offenses carrying mandatory minimum sentences prior to May 1, 1971.

By their attorneys,

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APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Nos. 71-1186, 71-1187,
71-1188, 71-1189.

UNITED STATES OF AMERICA,
APPELLEE,
v.
CHARLES B. BRADLEY, JR.,
BYRON H. JOHNSON,
ROBERT T. ODELL, JR., and
WILLIAM JAMES HELLIESEN,
DEFENDANTS, APPELLANTS.

DEFENDANTS', APPELLANTS' MOTION FOR STAY OF MANDATE

Defendants, appellants move that the mandate of this Court be stayed until such time as defendants, appellants shall have been resentenced by the District Court in accordance with defendants, appellants motion for order vacating sentences and for remand filed herewith.

By their attorneys,

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1304

JAMES B. BRADLEY, JR., BRYON H. JOHNSON, ROBERT T. ODELL, JR., AND WILLIAM JAMES HELLIESEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a jury trial in the United States District Court for the District of Massachusetts, petitioners were found guilty on May 6, 1971, of conspiring to violate 26 U.S.C. (1964 ed.) 4705(a) by selling a narcotic (cocaine) without a written order form, in violation of 26 U.S.C. (1964 ed.) 7237(b).[1] On June

[1] Petitioners Bradley, Odell, and Helliesen were also convicted of carrying a firearm during the commission of a felony, in violation of 18 U.S.C. (1964 ed.) 924(c)(2).

2, 1971, each petitioner was sentenced to a five-year term of imprisonment on the conspiracy conviction under 26 U.S.C. (1964 ed.) 7237(b).[a] The court of appeals affirmed (Pet. App. B).

Thereafter, relying on *United States* v. *Stephens*, 449 F. 2d 103 (C.A. 9), petitioners moved in the court of appeals for vacation of their sentences and for remand of the cause to the district court for resentencing (Pet. App. D). Petitioners contended that although 26 U.S.C. (1964 ed.) 7237(d) rendered suspended sentences, probation and parole unavailable in convictions for narcotics violations prior to May 1, 1971, the repeal of Section 7237(d) on May 1, 1971, in the Comprehensive Drug Abuse Prevention and Control Act of 1970[b] required the trial judge, in sentencing petitioners on June 2, 1971, to take into account the sentencing alternatives (suspension of sentence, probation, and parole availability) permissible under the new Act.

The court of appeals, treating the motion as an "appendage" to the original appeal, denied the requested relief (Pet. App. A). Explicitly rejecting the reasoning and result in *Stephens*, *supra*, the court held that, by virtue of the general federal savings statute (1 U.S.C. 109) and the specific savings clause of the new Act (Section 1103(a), 84 Stat. 1294), Section 7237(d) remained in force with respect to

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[a] In addition, petitioners Bradley, Odell and Helliesen received one-year suspended sentences on the firearms conviction with probation for three years to commence after the prison terms.

[b] 84 Stat. 1242, 21 U.S.C. 801-966.

violations occurring prior to May 1, 1971, regardless of the date of sentencing.

As we have previously discussed in other briefs, we perceive no conflict between *Stephens* and those cases upholding the imposition of the five-year minimum mandatory term upon persons sentenced after May 1, 1971. See, *e.g.*, the government's briefs in opposition in *Fiotto* v. *United States*, No. 71-1114, O.T., 1971, certiorari denied, May 15, 1972; *Wollack* v. *United States*, No 71-992, O.T., 1971; *Wooden* v. *United States*, No. 71-6085, O.T., 1971. The decision of the court below, however, is in direct conflict with the decision in *Stephens* with respect to the availability of suspended sentences and probation for persons sentenced after May 1, 1971, upon conviction for narcotics offenses occurring before that date.[4] We believe that the rationale supporting application of the earlier penalty provisions for offenses committed prior to the effective date of the 1970 Act also supports applying the Section 7237(d) bar against suspended sentence and probation in such cases, and that *Stephens* was therefore incorrectly decided.

Although there is a direct conflict about whether suspended sentence and probation are available, this issue is not, in itself, of continuing significance, as we noted in our brief in opposition in *Fiotto*, *supra*, at p. 6, n. 5. The 1970 Act applies to all offenses committed after its effective date of May 1, 1971, and the

[4] We are informed that none of the petitioners has a substantial criminal record so that probation, if available, is a realistic possibility in this case.

earlier statutes control where sentencing occurred prior to that date. Questions concerning the availability of those sentencing alternatives could arise, therefore, only in the cases that span the prior statutes and the 1970 Act.

However, the court below also decided that since Section 7237(d) applied, the district court could not consider fixing eligibility for parole at the time of sentencing (Pet. App. A, at pp. 12, 15). See 18 U.S.C. 4208. In view of the fact that Section 7237(d) bars parole as well as suspended sentences and probation, the court's decision in *Stephens*, distinguishing between sentence as such and probation,[5] also draws into question the availability of parole and strongly suggests a result contrary to that reached by the court of appeals in this case.[6] The question whether parole can be granted is not limited to those persons sentenced after May 1, 1971, but comprehends all persons in custody who, regardless of the date of sentencing, were convicted of violating the old narcotic laws, which did not permit parole.[7] Thus, the inconsis-

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[5] See also *United States* v. *Fithian*, 452 F. 2d 505 (C.A. 9).

[6] See, *e.g.*, *Batista* v. *United States*, No. 6301-Crim., C.D. Cal., decided April 21, 1972, modifying on the basis of *Stephens* a sentence imposed on October 29, 1970, under the old narcotics laws, by adding the following:

> "IT IS FURTHER ADJUDGED that the defendant shall become eligible for parole under Title 18, United States Code, § 4208(a)(2), at such time as the Board of Parole may determine."

[7] See note 6 *supra*.

tency between the decision below and the implications of *Stephens*, if not resolved, could place the Board of Parole in the untenable position of having to apply one rule regarding the availability of parole for prisoners previously convicted of narcotics offenses in the Ninth Circuit and another rule for prisoners convicted under the old narcotics laws in other circuits.[8] We therefore would not oppose the granting of the petition for a writ of certiorari in this case.[9]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1972.

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[8] If, as the court below held, Section 7237(d) bars parole eligibility for those persons sentenced after May 1, 1971, we think it necessarily follows that prisoners already convicted and sentenced before that date did not become eligible for parole when Section 7237(d) was repealed. On the other hand, it may not follow from *Stephens* that all persons now in custody for violating the narcotics laws, as distinguished from those persons sentenced after May 1, 1971, became eligible for parole after that date, although the district court in *Batista*, *supra*, so held.

[9] In taking this position we have considered the alternative of waiting to seek or support review of a decision more directly presenting the issue that, in our view, does have continuing significance: whether prisoners sentenced and convicted under the old narcotic laws are now eligible for parole because Section 7237(d) has been repealed. The difficulty with this is that in the interim, which may be a significant length of time, the Board of Parole may be compelled to follow a different rule for persons convicted in the Ninth Circuit than it follows for persons convicted elsewhere.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1972 [illegible] 757

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In the
Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1304

CHARLES B. BRADLEY, JR.,
BYRON H. JOHNSON,
ROBERT T. ODELL, JR., and
WILLIAM JAMES HELLIESEN,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONERS

Opinion Below

The opinion of the Court of Appeals (App. 19; Pet. for Writ of Cert. 11-15) is reported at 455 F.2d 1181, 1189 (on motion for order vacating sentences and for remand).

Jurisdiction

The final order of the Court of Appeals was entered March 10, 1972. (App. 20) The petition was filed April 10, 1972, and was granted June 12, 1972. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Statutory Provisions Involved

1 U.S.C. §109, 61 Stat. 633

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.
>
> ....

18 U.S.C. §3651, 62 Stat. 842, as amended

> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.
>
> • • •

18 U.S.C. §4202, 62 Stat. 854, as amended

> A federal prisoner, other than a juvenile delinquent or a committed youth offender, wherever confined and

serving a definite term or terms of over one hundred and eighty days, whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving one-third of such term or terms or after serving fifteen years of a life sentence or of a sentence of over forty-five years.

26 U.S.C. §4705(a), 68A Stat. 551

It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate. (repealed, effective May 1, 1971. §§1101(b)(3)(A), Pub. L. 91-513, 84 Stat. 1292; §1105(a), Pub. L. 91-513)

26 U.S.C. §7237, 70 Stat. 568

(b) Whoever ... conspires to commit an offense, described in section 4705(a) ... shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000 ....

* * *

(d) Upon conviction —

(1) of any offense the penalty for which is provided in subsection (b) of this section ...

the imposition or execution of sentence shall not be suspended, probation shall not be granted and in the case of a violation of a law relating to narcotic drugs, section 4202 of title 18, United States Code, and the Act of July 15, 1932 (47 Stat. 696; D.C. Code 24-201 and following), as amended, shall not apply. (repealed, effective May 1, 1971, §1101(b)(4)(A), Pub. L. 91-513, 84 Stat. 1292, §1105(a), Pub. L. 91-513)

Pub. L. 91-513, 84 Stat. 1236 *et seq.*

§1101, 84 Stat. 1292.

(b)(3)(A) Subchapter A of chapter 39 of the Internal Revenue Code of 1954 (relating to narcotic drugs and marihuana) is repealed.

(b)(4)(A) Section [ ] 7237 (relating to violation of laws relating to narcotic drugs and marihuana) ... of the Internal Revenue Code of 1954 are [is] repealed.

* * *

§1103(a)

Prosecutions for any violation of law occurring prior to the effective date of section 1101 shall not be affected by the repeals or amendments made by such section ..., or abated by reason thereof.

§1105(a)

Except as otherwise provided in this section, this title shall become effective on the first day of the seventh calendar month that begins after the day immediately preceding the date of enactment.

Questions Presented

Judgments of conviction were entered against petitioners on June 2, 1971 following guilty verdict by a jury on May 6, 1971, of conspiracy, prior to May 1, 1971, to violate 26 U.S.C. §§4705(a) and 7237(b), five days following the effective date of repeal (by §1101(b)(4)(A) of Pub. L. 91-513, 84 Stat. 1236) of 26 U.S.C. §7237(d), prohibiting suspension of sentence, grant of probation, or grant of parole to violators of 26 U.S.C. §4705(a). The questions presented are:

1. Whether the sentencing alternatives of suspension of sentence and probation otherwise available to the trial judge under 18 U.S.C. §3651 were made unavailable by §1103(a) of Pub. L. 91-513, 84 Stat. 1236 or by 1 U.S.C. §109.

2. Whether the judgments of convictions of conspiracy to violate 26 U.S.C. §§4705(a) and 7237(b) preclude application of 18 U.S.C. §4202 to grant petitioners release on parole during their confinement, if any.

Statement of the Case

This Court has granted certiorari to the United States Court of Appeals for the First Circuit to review an order entered March 10, 1972, (App. 20) denying petitioners' joint motion for order vacating sentences and for remand and for stay of mandate pending a resentencing, in accordance with the Court's opinion of March 10, 1972, (App. 11-15; Pet. for Writ of Cert. 11-15; *United States* v. *Bradley*, 455 F.2d 1181 (1 Cir., 1972)) which affirmed the sentences as "legally imposed".)

At the outset of trial, counsel for Johnson, speaking on behalf of all counsel, indicated petitioners' concern with the effect of repeal of 26 U.S.C. §7237. (App. 11)

Petitioners were sentenced to five years imprisonment each (App. 5-11) following a jury finding of guilty as to each defendant of conspiracy to violate 26 U.S.C. §4705(a) by selling cocaine not in pursuance of a written order form, in violation of 26 U.S.C. §7237(b). (App. 2-4) Petitioners Bradley and Johnson were also charged with substantive violations of 26 U.S.C. §4705(a) and acquitted and all petitioners other than Johnson were found guilty of violation of 18 U.S.C. §924(c)(2). The latter convictions, upon which each petitioner so convicted was sentenced to a suspended sentence of one year's imprisonment are not material to this petition.

The conspiracy for which petitioners were convicted was alleged to have taken place between March 4 and March 12, 1971, (App. 2-4) prior to May 1, 1971, the effective date of repeal by Pub. L. 91-513 of 26 U.S.C. §§4705(a) and 7237(b)

and (d), but the trial commenced with impanelment of a jury on May 3, 1971 and concluded with verdicts on May 6, 1971. (App. 1) Petitioners were thereafter sentenced on June 2, 1971.[1] (App. 5-11)

Following affirmance of the convictions on January 27, 1972, (App. 13) on February 7, 1972, petitioners filed in the district court motions for correction of an illegal sentence under Rule 35. (App. 2) The district court took no action upon the motions.

Petitioners thereupon filed joint motions with the court of appeals respectively for order vacating sentences and for remand and for stay of mandate. (App. 16-19)

The motion for vacation alleged that the sentences originally imposed by the district court were illegal in that the district court did not take into account "the provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 91-513, insofar as such Act provided the ... sentencing alternatives" of probation, suspension of sentence and parole, available as of May 1, 1971.

On March 10, 1972, the Court of Appeals entered the order previously referred to, denying petitioners' motion, (App. 20) with the accompanying opinion affirming the sentences. (App. 19; Pet. for Cert. 11-15) The court reached "the merits of [petitioners'] motion by considering it as an appendage to this appeal". (Pet. for Cert. 11)

Summary of Argument

I. If, as petitioners suggest, the later special saving clause, Pub. L. 91-513, §1103(a), conflicts with 1 U.S.C. §109, this Court need only deal with the question of application of §1103(a) to 26 U.S.C. §7237(d)(1). That question is dealt with in point II.

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[1] The opinion of March 10, 1972, is incorrect insofar as it states that May 1, 1972 was "five days prior to sentencing".

On the other hand, if there is no conflict between the general saving provision and the special saving provision, this Court, for reasons more fully stated in point IV, should treat the words "penalty, forfeiture, or liability" in 1 U.S.C. §109 as being comprehended within "prosecutions" as used in Pub. L. 91-513, §1103(a).

II. Although the word "prosecutions" in Pub. L. 91-513 certainly includes sentence, the exercise of the trial court's discretion to grant or not to grant probation or to suspend or not to suspend sentence, is not part of prosecution.

Final judgment means sentence, but probation and suspension of sentence may be granted between imposition of sentence and the time when actual service of sentence begins, demonstrating that these "acts of grace" may take place after the conclusion of the prosecution. Furthermore, the punitive aspects of sentence and the determination of factual issues involved prior to judgment, looking to the past, are quite different than the rehabilitative and reformative aspects of probation and suspension of sentence under 18 U.S.C. §3651, which look to the future.

The prohibitions in 26 U.S.C. §7237(d)(1) were repealed by §1101 of Pub. L. 91-513, since the repeal did not affect or abate the prosecution of petitioners.

III. This Court, in *Morrissey* v. *Brewer*, —— U.S. ——, ——, (1972), No. 71-5103, 70 U.S.L.W. 5016, 5018 (June 29, 1972), made it clear that parole arises after the end of criminal prosecution, including imposition of sentence. Parole, made inapplicable to certain narcotics offenses by 26 U.S.C. §7237(d) (1), repealed effective May 1, 1971, is available following May 1, 1971, since its repeal does not affect or abate prosecutions within the meaning of Pub. L. 91-513, §1103(a).

IV. If Pub. L. 91-513, §1103(a) did not conflict with the general saving statute, 1 U.S.C. §109, 1 U.S.C. §109 nevertheless does not save 26 U.S.C. §7237(d)(1).

Unless it is suggested that "penalty, forfeiture, or liability" is not part of the prosecution, which petitioners do not understand the Government to contend, even under the broadest interpretation of those words, since parole arises after the end of prosecution, including sentence, 1 U.S.C. §109 does not deal with parole and therefore does not save 26 U.S.C. §7237(d)(1). Parole does not change penalty or liability but is merely a variation upon imprisonment. Integrity of the law is nonetheless maintained, even though a prisoner convicted of an offense committed prior to May 1, 1971, and sentenced afterwards is later paroled. The prisoner has suffered the consequences of his conduct.

With respect to the effect of 1 U.S.C. §109 upon the no probation, no suspension of sentence provisions of 26 U.S.C. §7237(d)(1), this Court is requested to consider the arguments made under point II with respect to Pub. L. 91-513 as also applicable here.

However, the question as to 1 U.S.C. §109 involves examination of the meaning of "penalty, forfeiture, or liability".

None of the cases relied upon by the court below dealt with the question dealt with here, and petitioners do not question the correctness of holdings contained in such cases, *e.g.* that trial and sentence of an alleged offender against a repealed statute is saved by the general saving statute and that choice between several defined punishments, death, a life sentence or a term of years, is unavailable because of 1 U.S.C. §109 to a sentencing judge when prosecution is under a repealed statute providing only death or life imprisonment as punishment.

Under such cases "penalty" or "liability" refer to the specific punishment fixed by a statute. Such penalty or

liability may be made subject to the exercise of judicial discretion by probation legislation granting discretion independent of the discretion granted by statutes fixing specific terms of imprisonment or amounts of fines as sentence.

Neither the grant of probation nor the suspension of sentence releases or extinguishes a penalty, forfeiture or liability, nor is prosecution for the enforcement of a penalty, forfeiture or liability abated by repeal of 26 U.S.C. §7237(a)(1). Petitioners, therefore, were entitled to have the trial judge at sentencing consider, in addition to the appropriate minimum term of years of imprisonment under 26 U.S.C. §7237(1), whether to exercise his discretionary powers under 18 U.S.C. §3651.

Argument

I. If Pub. L. 91-513, §1103(a) Is In Conflict With 1 U.S.C. §109, The Provisions Of §1103(a) Control. If The Statutes Are Not In Conflict, The Words Of 1 U.S.C. §109 Should Be Read Consistently With Those Used In Pub. L. 91-513.

There are, we submit, two alternative approaches to the question as to the impact of 1 U.S.C. §109 and §1103(a) of Pub. L. 91-513 upon 26 U.S.C. §§4705(a), 7237(b) and 7237(a)(1).

If, as we suggest, §1103(a) "necessarily, or by clear implication, conflicts with the general rule declared in [1 U.S.C. §109[2]]. . . .", "the latest expression of legislative will [§1103(a)] must prevail." *Hertz* v. *Woodman*, 218 U.S. 205, 218 (1910). Whether there is such a conflict depends in turn on the question of whether the words

[2] 1 U.S.C. §109 is the successor to Rev. St. §13, dealt with in *Hertz* v. *Woodman*.

"penalty, forfeiture, or liability", as used in 1 U.S.C. §109 are treated as going beyond the incidents of "prosecutions", as that word is used in Pub. L. 91-513, §1103 (a).

We also, however, suggest in the alternative that the words "penalty, forfeiture, or liability", are comprehended within the word, "prosecutions", so that 1 U.S.C. §109 and Pub. L. 91-513 are not in conflict and may be read together.

In support of either interpretation, we would suggest that the enactment by the Congress of §1103(a) would be without purpose, if 1 U.S.C. §109 were to control its meaning.

In *Hertz* v. *Woodman*, 218 U.S. 205 (1910), an act had been partially repealed. Among those sections repealed was a section providing for the taxation of legacies. Among the sections not repealed was a section providing that the tax upon legacies should become due and payable in one year after the death of the testator. This Court addressed the question as to whether or not a saving clause directed specifically to taxes imposed under the first section saved the tax where the testator had died before the repeal but, under the second, did not become due and payable until afterwards.

This saving clause provided in material respects: "That all taxes or duties imposed by [the repealed statute] prior to the taking effect of this act, shall be subject as to lien, charge, collection, and otherwise, to the provisions of [a section of the repealed act providing that the tax or duty imposed should be due and payable in one year after the death of the testator], which are hereby continued in force, as follows . . ." This Court stated the question in the case to be "whether the tax in question had been 'imposed' prior to the going into effect of the re-

pealing act within the intent and effect of the saving clause just set out." (218 U.S., at 205) (single quotation marks added)

In its analysis of the repealed statute, the Court found that the tax was "imposed" upon the death of the testator and became a "liability" (see Rev. St. 13, 1 U.S.C. §109) at the same instant. Thus the "liability . . . was not relieved . . . as a consequence of the saving clause in the repealing act . . . ." 218 U.S., at 218. The Court therefore held that the tax "was saved by the saving clause of the repealing act." (218 U.S., at 205). The holding of the Court, therefore, was as we urge the holding in this case should be, that the terms of the saving clause contained in the repealing act controlled. The significance of Rev. St. §13 (now 1 U.S.C. §109) was that the saving clause in the repealed statute did not cut down the scope and operation of §13.

In *Great Northern Railway Co.* v. *United States*, 208 U.S. 452 (1908) the repealing act contained saving language as follows:

> "But the amendment herein provided for shall not affect causes now pending in courts of the United States, but such cases shall be prosecuted to a conclusion in the manner heretofore provided by law."

The Court considered the question as to whether these words "conflict[ed] with the general rule established by §13, Rev. Stat. . . . ." (208 U.S., at 466) and held that they did not, since they had only the effect of continuing in force prosecution procedures as to cases pending under the repealed statute, and that therefore the Government did not lose its right to prosecute for violations of the repealed statute.

Aside from the conclusion that the *Great Northern Rail-*

way Co. case goes no further than to hold, with which holding petitioners do not quarrel, that Rev. St. §13, now 1 U.S.C. §109, saves a prosecution which otherwise could not have been brought under a repealed statute, these two cases show (1) that a specific saving clause in an act repealing a statute which conflicts with the general saving clause destroys the effect of the general saving statute (*Great Northern Railway Co.* v. *United States*, 208 U.S. 452, 466 (1908)), (2) that such a specific saving clause which "cuts down the scope and operation" of the general saving statute may relieve of liabilities which would otherwise be saved in the repealed statute by the general saving statute (*Herts* v. *Woodman*, 218 U.S. 205, 218 (1910)), (3) that where there is no conflict, but the question is as to the meaning of the special saving clause, the Court will base its holding on the special rather than the general clause, even though the general clause is treated "as a rule of construction (*Herts* v. *Woodman*, *supra*, 218 U.S., at 217, 244) and (4) that in a case where the special saving clause deals with remedies rather than substance, there is no conflict, and the general saving statute saves the substance of prosecutions. *Great Northern Railway Co.* v. *United States*, *supra*, 208 U.S., at 467-470.

We submit that if the words "penalty, forfeiture, or liability", as used in 1 U.S.C. §109, relate to incidents of an individual's involvement with the criminal law going beyond the incidents of "prosecutions" as used in §1103(a) of Pub. L. 91-513, (which proposition we do not concede, but include, should this Court differ with us) then the scope and operation of 1 U.S.C. §109 is plainly cut down so that this Court need not concern itself with the effect of 1 U.S.C. §109 upon petitioners' situation but only with the effect of §1103(a) of Pub. L. 91-513.

We further submit that, if 1 U.S.C. §109 and §1103(a) are treated as not in conflict, this Court should treat the

words "penalty, forfeiture, or liability" in 1 U.S.C. §109 as being contained within the word "prosecutions" as used in §1103(a) in order "that effect be given to all the parts of a law." *Great Northern Railway Co.* v. *United States*, 208 U.S. 452, 465 (1908). If from this point of view, the relationship of the two statutes appears to be ambiguous, the rule of construction is clear.

> "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity shall be resolved in favor of lenity. . . ." *Bell* v. *United States*, 349 U.S. 81, 83 (1965). *cf. Hamm* v. *City of Rock Hill*, 379 U.S. 306, 313 (1964).

II. Probation And The Suspension Of Sentence Are Not Part Of Sentence, Which Is Part Of "Prosecution", As The Word Is Used In §1103(a) Of Pub. L. 91-513, And 26 U.S.C. §7237(d)(1) Was Not Saved By §1103(a).

If petitioners are correct in their contention that §1103(a) of Pub. L. ~~0-513~~ 91-513 is an expression of legislative will which by its terms prevails over 1 U.S.C., §109,[3] the effect upon 26 U.S.C., §§4705(a), 7237(b) and 7237(d)(1) of §1103(a) and, in particular, whether §7237(d)(1) is saved by §1103(a) is the only question in this case.

One need not read §1103(a) of Pub. L. 91-513 to provide that "prosecution" excludes sentencing, the interpretation apparently placed on the holding in *United States* v. *Stephens*, 449 F.2d 103, 105 (9 Cir., 1971) by the court below,

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[3] Petitioners do not concede that rejection of this contention is fatal to their ultimate contention that probation and suspended sentences are available to offenders against 26 U.S.C. §§4705(a) and 7237(b). As argued *infra* (pp. 21-25). 1 U.S.C. §109, even if applicable, notwithstanding the later passage of §1103(a), does not preclude these exercises of judicial discretion.

(*United States* v. *Bradley*, 455 F.2d 1181, 1191 (1 Cir., 1971)), by the Second Circuit, (*United States* v. *Ross*, —— F.2d ——, —— (2 Cir., 1972), Dkt. No. 72-1135, Slip Op. 3475, 3479 (June 13, 1972)), by the Third Circuit, (*United States* v. *Caldwell*, —— F.2d ——, (3 Cir., 1972) Dkt. No. 72-1200, Slip Op. 6, (July 5, 1972)) and by the Tenth Circuit, (*Page* v. *United States*, 459 F.2d 467, 468 (10 Cir., 1972)) to reach the conclusion that, although prosecution includes sentence, sentence does not automatically include the decision of the trial court as to whether to exercise its suspension of sentence and probation discretion under 18 U.S.C. §3651.

Chronologically, the probationary power and the power to suspend sentence continues from the time when sentence is imposed until execution of the sentence theretofore imposed commences. *Affronti* v. *United States*, 350 U.S. 79, 83 (1955); *United States* v. *Murray*, 275 U.S. 347, 356-358 (1928). "The court's authority [to suspend sentence and to place a defendant on probation] arises 'upon entering a judgment of conviction,' 18 U.S.C. §3651, and it terminates when the convicted defendant actually enters upon the service of his prison sentence ...." *United States* v. *Ellenbogen*, 390 F.2d 537, 541 (2 Cir., 1968).

Nevertheless, "[f]inal judgment means sentence". *Berman* v. *United States*, 302 U.S. 211, 212 (1937). Whether following sentence to a term of years or to a fine, or contemporaneously therewith, the considerations involved in exercise of the court's powers under 18 U.S.C. §3651 are quite different from those involved in prosecution. It is not an over-generalization to say that probation deals with future events not, as prosecution does, with past events, such as the determination of guilt, an examination of the defendant's background, and the appropriate penalty for the guilty offender. This is clear from the language of this Court.

"Probation is concerned with rehabilitation, not with the determination of guilt. It does not secure reconsideration of issues that have been determined or change the judgment that has been rendered. Probation or suspension of sentence 'comes as an act of grace to one convicted of a crime' .... The considerations it involves are entirely apart from any re-consideration of the merits of the litigation. Probation was designed 'to aid the rehabilitation of a penitent offender;' 'to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable.'" *Berman* v. *United States*, 302 U.S. 211, 213 (1937).

The distinction between sentence, which petitioners contend ends, and is part of, the prosecution process, and the grant of probation and the suspension of sentence, which petitioners contend is not part of that process, is made clear in *Roberts* v. *United States*, 320 U.S. 264, 267 (1943), in which the Court discussed the position of the petitioner in that case:

"Neither probation nor suspension of execution rescind the judgment sentencing petitioner to imprisonment; the one merely ordered that petitioner be released under the supervision of probation officials, the other that enforcement of his sentence be postponed. Upon their revocation, without further court action, the original sentence remained for execution as though it had never been suspended."

That probation is not part of the sentence, and therefore not part of "prosecution" is evidenced by the holding in *Thomas* v. *United States*, 327 F.2d 795 (10 Cir., 1964),

that the period spent on probation is not counted as part of the term of imprisonment, when probation was revoked and the suspended sentence imposed. The Court said: "It [probation] is an act of grace to one convicted and is granted as a privilege, not as a right." And in *Burns* v. *United States*, 287 U.S. 216, 222 (1932), this Court pointed out that a probationer "is still a person convicted of an offense and the suspension of his sentence remains within the control of the court."

Following this reasoning, the Second Circuit states in a recent case that the original term, even though suspended, "informs [the probation judge] of what the trial judge thought an appropriate prison term would be." *United States* v. *Nagelberg*, 413 F.2d 708, 711 (2 Cir., 1969).

Thus, the length of the prison term imposed, even though suspended, measures the punishment for the offense, in the event a defendant does not "take advantage of [his] opportunity for reformation." *Berman* v. *United States*, 302 U.S. 211, 213 (1937).

The Ninth Circuit, in *United States* v. *Stephens*, 449 F.2d 103 (9 Cir., 1971), it is plain, did not intend in its holding (or in the language used by it, *id.*, at 105) to exclude sentence from "prosecution" for the purpose of §1103(a) of Pub. L. 91-513. This is made clear in the same court's later holding in *United States* v. *Fithian*, 452 F.2d 505, 506 (9 Cir., 1971) to the effect that the minimum term of imprisonment prescribed in 21 U.S.C. §176(a) was the sentence required to be imposed for an offense occurring prior to May 1, 1971. The distinction between a sentence "*under* 21 U.S.C. 176(a)" (*id.*) and probation is clarified by the court's explication of *Stephens* "that the new Act [Pub. L. 91-513] from its effective date had rendered probation available to offenses committed under §176(a)." *United States* v. *Fithian*, *supra*, at 506. *Accord*, *United States* v.

Rojas-Colombo, —— F.2d ——, —— (5 Cir., 1972), Dkt. No. 71-2438, Slip Op., 4, (June 23, 1972); *United States* v. *McGarr*, —— F.2d ——, —— (7 Cir., 1972), Dkt. No. 72-1108, Slip Op., 4-6, (April 28, 1972).[4]

Conceptually, then, sentence ("judgment", *Berman* v. *United States*, 302 U.S. 211, 212 (1937)) is separate from probation and suspension of execution of sentence. *Roberts* v. *United States*, 320 U.S. 264, 267 (1943). This conceptual separation is supported by the legality of their occasional chronological separation. *Affronti* v. *United States*, 350 U.S. 79, 83 (1955). This analysis demonstrates the underlying rationale in cases such as *United States* v. *McGarr*, —— F.2d ——, —— (7 Cir., 1972), Slip Op. at 6, for the proposition that "[t]he availability of these provisions [for probation and parole] in no way eliminates the penalty."

We submit that the prohibitions against suspension of sentence, grant of probation and parole contained in 26 U.S.C. §7237(a)(1) have been repealed by §1101 of Pub. L. 91-513, since such repeal did not affect prosecution of petitioners under 26 U.S.C. §§4705(a) and 7237(b) within the meaning of §1103(a) of Pub. L. 91-513.

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[4] "We believe defendants prosecuted under the old statute must necessarily *be sentenced* under the old statute." *id.*, at 4

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"[W]hen Congress does expressly repeal a statute, we should not read a savings clause so broadly that it encompasses much more than is necessary to achieve its general purpose — preventing the abatement of prosecutions which, at common law, would otherwise have resulted from the repeal of a statute or from the change in the definition of an offense.

"We therefore agree with the Ninth Circuit that the availability of probation under 18 U.S.C. §3651, or, for that matter, parole under 18 U.S.C. §4202 (both of which were unavailable by reason of 26 U.S.C. §7237(d)), *is not part of the penalty.*" *id.*, at 5 (emphasis added)

III. Since Parole Arises After The End Of Criminal Prosecution, §1103(a) Of Pub. L. 91-513 Does Not Save That Portion Of 26 U.S.C. §7237(d)(1) Making 18 U.S.C. §4202 Inapplicable To Certain Narcotics Prosecutions.

It is even clearer than in the case of the non-applicability of §1103(a) of Pub. L. 91-513 to the availability of probation, argued *supra* (pp. 13-17), that §1103(a) did not save that portion of 26 U.S.C. §7237(d)(1) providing "in the case of a violation of a law relating to narcotic drugs, section 4202 of Title 18, United States Code [relating to availability of parole] . . . shall not apply."

It bears repeating that §1103(a) provides that "prosecutions" for violations of law occurring prior to May 1, 1971, are not to be affected by the "repeals" made by §1101 of Pub. L. 91-513.

The statement of this Court as to the relationship of parole to prosecution is definitive and timely. On June 29, 1972, this Court, speaking through the Chief Justice, said: "Parole arises after the end of the criminal prosecution, including imposition of sentence." *Morrissey* v. *Brewer*, —— U.S. ——, —— (1972), No. 71-5103, 40 U.S.L.W. 5016, 5018 (June 29, 1972). The statement of the relationship is not dependent upon construction of a particular federal statute but is a generic definition of the institution of parole, arising as it does in the context of review of a state parole proceeding. *id.*, at 5016. It settles without question at least two issues in this case. (1) The imposition of sentence is included in "prosecution".[5] (2) Parole is in no sense part of a "criminal prosecution".

[5] See the discussion *supra* (pp. 16-17) of the misconceptions of the holding in *United States* v. *Stephens*, 449 F.2d 103, 105 (9 Cir., 1971) by the First, Second, Third and Tenth Circuits.

This is consistent with the framework of the federal parole statutes, which establish a Board of Parole in an executive department, (18 U.S.C. §4201, Pub. L. 80-645, 62 Stat. 854, as amended) apply to Federal prisoners already confined, (18 U.S.C. §4202) and give only to the executive board power both to grant and revoke parole. (18 U.S.C. §§4203, 4205, 4207) Only in the limited statutory area in which Congress has authorized sentencing courts either to fix a minimum parole eligibility term or to grant discretion to the Board of Parole to determine parole eligibility (18 U.S.C. §4208(a), Pub. L. 85-752, §3, 72 Stat. 845) are such courts at the time of sentencing involved in the parole process. 26 U.S.C. §7237(d)(1) does not, however, refer in its terms to 18 U.S.C. §4208(a).

That portion of 18 U.S.C. §7237(d)(1) providing that 18 U.S.C. §4202 "shall not apply" to offenses for which the penalty is provided in 26 U.S.C. §7237(b) was repealed effective May 1, 1971 (Pub. L. 91-513, §1105) by §1101 of Pub. L. 91-513, because, as stated by this Court, parole is not part of the "criminal prosecution". 18 U.S.C. §4202 does once again "apply", its non-applicability under 26 U.S.C. §7237(d)(1) not having been saved by §1103 of Pub. L. 91-513.

IV. If, Notwithstanding The Later Enactment Of Pub. L. 91-513, 1 U.S.C. §109 Nevertheless Remains Applicable To Prosecutions Under 26 U.S.C. §§4705(a) And 7237(b), It Does Not Save 26 U.S.C. §7237(d)(1), Since The Respective Executive And Judicial Powers With Respect To Parole, Suspension Of Sentence And Probation Do Not Fall Within The Meaning Of "Penalty, Forfeiture, Or Liability".

Petitioners have argued *supra* (pp. 9-12) that §1103(a) of Pub. L. 91-513 conflicts with the general rule of 1 U.S.C.

§109 and therefore 1 U.S.C. §109 need not be treated as applicable in any way. If petitioners are incorrect, they submit nevertheless that, for reasons closely analogous to the reasons for which §1103(a) did not save 26 U.S.C. §7237 (d)(1), 1 U.S.C. §109 similarly did not save §7237(d)(1) from repeal.

1. *Parole*

As a matter of statutory interpretation the issue as to the relationship of 1 U.S.C. §109 to that portion of 26 U.S.C. §7237(d)(1) rendering 18 U.S.C. §4202 inapplicable to offenses referred to in 26 U.S.C. §7237(b) is, following the reasoning of this Court in *Morrissey* v. *Brewer*, —— U.S. ——, —— (1972), No. 71-5103, 41 U.S.L.W. 5016 (June 29, 1972), easily clarified. "Parole arises after the end of the criminal prosecution, including imposition of sentence." 41 U.S.L.W., at 5018. Even under the broadest interpretation of 1 U.S.C. §109, (*Compare United States* v. *McGarr*, —— F.2d ——, —— (7 Cir., 1972) Dkt. No. 72-1108, Slip Op., at 5 (April 28, 1972); *United States* v. *Stephens*, 449 F.2d 103, 106 (9 Cir., 1971)) if "parole arises after the end of the criminal prosecution, including imposition of sentence", the inapplicability of 18 U.S.C. §4202 is not a part of the "penalty . . . , or liability incurred under" 26 U.S.C. §4705 (a) or under 26 U.S.C. §7237(b). "[T]he question of parole is by the statute made a matter entirely for the judgment and discretion of the Board of Parole. 54 Stat. 243; 18 U.S.C. §4203. The courts are without any power to grant a parole." *Cagle* v. *Harris*, 349 F.2d 404, 404-405 (8 Cir., 1965).

As this Court said: "The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence". *Morrissey* v. *Brewer*, —— U.S.

——, —— (1972), No. 71-5103, 40 U.S.L.W. 5016, 5018 (June 29, 1972). Thus, parole does not change the penalty or liability. It merely "is an established variation on imprisonment of convicted criminals." 40 U.S.L.W., at 5017. The Government's prosecution has been sustained in the case of a defendant who, following his sentence, becomes at some point eligible for parole, and the Government's freedom "to maintain the integrity of the law by insisting that those who violate it suffer the consequences" (*United States* v. *United States Coin and Currency*, 401 U.S. 715, 738-739 (1971), Burger, C.J., dissenting) has in no way been impaired.[6]

In summary, 1 U.S.C. §109 does not save from repeal that portion of 26 U.S.C. §7237(d)(2) making the provisions of 18 U.S.C. §4202 inapplicable to defendants convicted and sentenced under 26 U.S.C. §§4705(a) and 7237(b).

2. *Probation and Suspension of Sentence*

The considerations involved in an analysis of the effect of 1 U.S.C. §109 on the availability to the trial judge of suspension of sentence and probation under 18 U.S.C. §3651 with respect to petitioners are in large part the same as those involved in analysis (as *supra* pp. 13-17) of the relationship between §1103(a) of Pub. L. 91-513 and the same subjects.

Thus, "such statute [the repealed statute] shall be treated

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[6] Although petitioners were sentenced on June 2, 1971, (App. 5, 7, 8, 10) following May 1, 1971, the effective date of repeal of 26 U.S.C. §7237(d)(2), by P.L. 91-513, §§1101 and 1105(a), a broader question is presented with respect to those sentenced prior to May 1, 1971, who, now that the "non-applicability" provision of 26 U.S.C. §7237(d)(2) has been repealed, may be equally eligible for parole to those sentenced subsequent thereto. Petitioners, since not affected, take no position in the question as to whether 18 U.S.C. §4202 now equally applies to such individuals.

as remaining in force for the purpose of sustaining any proper action or *prosecution* for the enforcement of such penalty, forfeiture or liability . . . ." 1 U.S.C. §109 (emphasis added) The same questions as to the meaning of "prosecution" are present. We therefore respectfully request this Court to consider here the arguments made *supra* with respect to the effect of the capacity of the sentencing court to suspend sentence and grant probation between the time of sentencing and the actual commencement of service of sentence (p. 14) and the different considerations involved in the assessment of the length of term of imprisonment or amount of fine on the one hand and in the exercise of discretion to suspend sentences and grant probation, on the other. (pp. 14-16) *See Berman* v. *United States,* 302 U.S. 211, 213 (1937); *Roberts* v. *United States,* 320 U.S. 264, 267 (1943).

However, the question as to whether the repeal of 26 U.S.C. §7237(d)(1) releases or extinguishes a penalty, forfeiture or liability incurred under 26 U.S.C. §§4705(a) and 7237(b) and whether the provisions of §7237(d)(1) are within the meaning of "any penalty, forfeiture, or liability" which prosecution under §§4705(a) and 7237(b) enforces, are questions which, because of the difference in wording, are beyond the analysis of §1103(a) of Pub. L. 91-513 heretofore argued.

The reliance of the court below upon *United States* v. *Reisinger,* 128 U.S. 398, 402 (1888) is inapt here. See *United States* v. *Bradley,* 455 F.2d 1181, 1190 (1 Cir., 1971). The holding in Reisinger was a holding with which petitioners do not take issue, that is, that, by reason of Rev. St. §13, the predecessor of 1 U.S.C. §109, a defendant prosecuted under a repealed statute for conduct prior to the effective date of repeal could be convicted and punished for such conduct according to the penalties contained in the statute.

No question as to availability of suspension of imposition or execution of sentence or of probation was raised.[7]

Similarly, in *Great Northern Railway Co.* v. *United States*, 208 U.S. 452 (1908), the only question was whether repeal of the statute under which the defendant was indicted prevented prosecution for alleged conduct defined as an offense in the repealed statute.

And in *Lovely* v. *United States*, 175 F.2d 312 (4 Cir., 1949), also relied upon by the court below, (455 F.2d, at 1190, fn. 1) the holding was that 1 U.S.C. §109 prevented the trial judge from exercising a broader statutory discretion to choose among several penalties, including imprisonment for a term of years, set forth in the new statute, and limited him to the choice between sentences of death or life imprisonment set forth in the prior statute. Petitioners, unlike the defendant in *Lovely*, do not contend that the penalties specifically set forth in the repealed statute (in this case 26 U.S.C. §7237(b)) do not apply to them.

Petitioners in this case have not urged and do not now urge, as did the defendant in *United States* v. *Reisinger*, 128 U.S. 398, 400 (1888), "that the statute creating the offense set forth in the indictment, and fixing the punishment therefor, had been repealed, without saving the right to the United States to prosecute for offenses committed in violation of said act prior to the repeal of the same." (App. 3, 16-17, 18)

The "penalty" (*Ex Parte United States*, 242 U.S. 27, 52 (1916)) or "liability" (*Lovely* v. *United States*, 175 F.2d 312, 316-317 (4 Cir., 1949)) referred to in 1 U.S.C. §109 is in this case the term of years of imprisonment and fine set

[7] At the time *Reisinger* was decided, many (but not all) trial courts through the years had exercised a non-statutory power to suspend sentences, but probation was not available until passage in 1925 of the Probation Act, 43 Stat. 1259, c. 521. *United States* v. *Murray*, 275 U.S. 347, 352, 357 (1927). See *Ex Parte United States*, 242 U.S. 27 (1916).

forth in 26 U.S.C. §7237(b), which are not released or extinguished by repeal. The prosecution under the indictment (App. 2-3) enforced these penalties and liabilities by making petitioners subject to punishment thereunder pursuant to "the plain legislative command [in 26 U.S.C. §7237 (b)] fixing a specific punishment for crime ...." *Ex Parte United States*, 242 U.S. 27, 42 (1916). That the Congress, by "causing of the imposition of *penalties as fixed* to be subject, by probation legislation ... to such judicial discretion as may be adequate to enable courts to meet, by the exercise of an enlarged but wise discretion, the infinite variations which may be presented to them for judgment" (*id.*, at 42, emphasis added) does not show an intention upon the part of the Congress to bring the exercise or non-exercise of that discretion within the words "penalty, forfeiture, or liability" as used in 1 U.S.C. §109. It is by the judgment, pursuant to their prosecution, sentencing persons in the position of these petitioners to imprisonment, regardless of whether discretion is exercised to suspend the sentence and grant probation, that the "penalty, forfeiture or liability" fixed by 26 U.S.C. §7237(b) is enforced. *See Roberts* v. *United States*, 320 U.S. 264, 267 (1943). The prosecution, which is "but an application or enforcement of the law", (*United States* v. *Chambers*, 291 U.S. 217, 226 (1934)) is no less sustained because a sentence is suspended and probation granted. The reasons for 1 U.S.C. §109 are not in that case undercut. *cf. United States* v. *United States Coin and Currency*, 401 U.S. 715, 739 (1971) (dissenting opinion, Burger, C.J.).

Since the grant of probation or the suspension of sentence will not release or extinguish any penalty, forfeiture, or liability, 1 U.S.C. §109 does not save 26 U.S.C. §7237(d)(1), insofar as 18 U.S.C. §3651 makes probation or suspension of sentence available. For the same reasons, no prosecution for the enforcement of a penalty, forfeiture or liability is

abated by repeal of §7237(d)(1), which is therefore not required to be kept in force by 1 U.S.C. §109. Petitioners were therefore entitled, on June 2, 1971, (App. 5-11) to have the trial judge consider not only the appropriate confinement sentence within the upper and lower ranges provided by 26 U.S.C. §7237(b), but also whether or not to exercise his discretion under 18 U.S.C. §3651 to grant probation and to suspend execution of such sentences.

Conclusion

For the reasons hereinbefore stated it is respectfully submitted that the order of the court below dated March 10, 1972, denying petitioners' motion for order vacating sentences and for remand be vacated and that this case be remanded to the court below with an order that further proceedings with respect to petitioners are to be subject to 18 U.S.C. §§3651 and 4202.

Respectfully submitted,

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MISCELLANEOUS.

Supreme Court of the United States.

OCTOBER TERM, 1972.

No. 71-1304.

CHARLES B. BRADLEY, JR., BYRON H. JOHNSON, ROBERT T. ODELL, JR., AND WILLIAM JAMES HELLIESEN,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF RALPH DE SIMONE, AMICUS CURIAE.

Interest of Amicus.

This brief is filed with the consent of the parties. Letters of consent are on file with the Clerk in their original manuscript form, and they are reprinted herein as Appendix D. It is submitted because, as will appear, the *amicus* has a direct and substantial interest in the outcome of this litigation. Despite his interest, however, the *amicus* has no desire to burden this Court with a brief which simply repeats matters fully discussed by the parties. The *amicus* has had

the benefit of a preliminary draft of the brief submitted by the Petitioners, and accordingly the *amicus* will be able to make his additional points with some economy.

The opinion below, jurisdiction of this Court, questions presented, statutory provisions involved, and statements of the case are adequately presented by the parties to this litigation; accordingly they are omitted here. So far as pertains to this *amicus*, however, we will set forth pertinent facts, and we have included several appendices setting forth portions of the record of the *amicus'* case currently pending on appeal in the United States Court of Appeals for the Second Circuit.

The *amicus* was a defendant in *United States of America* v. *Ralph De Simone and Anthony Pagliuca*, Indictment No. 71 Cr. 587 (U.S. D.C., S.D. N.Y.) (Appendix A). The indictment, filed on June 2, 1971, charged De Simone with a single count conspiracy to violate the narcotic importation statute, Title 21, United States Code, Sections 173 and 174 (repealed effective May 1, 1971) from "on or about the 1st day of December, 1967 and continuously thereafter up to and including the date of the filing of this indictment [June 2, 1971] . . . ." Four overt acts are listed in the indictment, beginning with an act on or about May 1, 1970, and concluding with an act on or about May 17, 1971.

While this conspiracy was going forward, the statute upon which the indictment is predicated was repealed by Pub. L. 91-513, which was enacted to cover the conduct previously made criminal by 21 U.S.C. §§ 173 and 174. The new statute, known as the Comprehensive Drug Abuse Prevention and Control Act of 1970, became effective on May 1, 1971, the same date that the repeal of the old statute became effective. The major difference between the new and old statutes is that the new statute made more flexible the

penalty and related provisions for narcotic violations. Of particular interest to the *amicus* is the repeal of 26 U.S.C. § 7237(d)(1), which statute had deprived convicts in narcotics cases of parole eligibility under 62 Stat. 854, 18 U.S.C. § 4202.

Mr. De Simone was sentenced on March 6, 1972, to a term of ten years and a fine of $20,000 under 21 U.S.C. §§ 173 and 174. Under the current Second Circuit doctrine, see, *e.g.*, *United States* v. *Fiotto*, 454 F. 2d 252 (1972), his sentence will be subject to the no-parole provisions of repealed § 7237(d). Mr. De Simone took an appeal from denial of his motion to correct sentence, which appeal is now pending in the United States Court of Appeals for the Second Circuit (Docket No. 72-1311), with oral argument currenly scheduled for the second week of September 1972.

The *amicus* has, of course, a direct interest in the Petitioners' securing a victory on any one or more of the points advanced by them, for a more flexible sentencing approach would, at the very least, make the Petitioner a candidate for parole at the appropriate time.[1]

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[1] Normally, a federal prisoner is eligible for parole either after service of one-third of his sentence, 18 U.S.C. § 4202, 62 Stat. 854, as amended, or, if the sentencing judge so provides, immediately at the discretion of the parole board, 18 U.S.C. § 4208(a)(2). Hence, this issue of parole eligibility is ripe for the *amicus*, since a ruling that he is entitled to parole might make him immediately eligible should the sentencing judge impose a § 4208(a)(2) sentence. Because of the length of his sentence, the *amicus* is more concerned with the no-parole proviso of prior law than with the minimum-mandatory, no-probation, no-suspended sentence provisions. Hence, the *amicus* wishes to argue that even if the savings clause preserves the minimum-mandatory, no-probation, no-suspended sentence provisions, the no-parole provision still expired on the date of repeal and is not affected by the savings clause. Of

Finally, in the event that this Court ultimately rules against the contentions of the Petitioners, the *amicus* has an interest in persuading the Court that its opinion and holding should not be sufficiently broad to encompass the differing fact situation of his own case, thus depriving him of his "day in Court."

Summary of Argument.

Under the relevant savings statute, § 1103(a) of P.L. 91-513, the issue of whether a provision lives on after repeal depends solely upon whether its abandonment would "affect" or "abate" a "prosecution." Parole decisions, which are made by a nonjudicial body long after the end of trial, do not "affect" any "prosecution." Therefore, the proviso in § 7237(d) of former Title 21 making the parole statute inapplicable to narcotics offenses is not "saved" by § 1103(a). In this respect the no-parole proviso of § 7237 (d) may be distinguishable from the no-probation proviso. Arguably, the no-probation proviso "affects" a "prosecution" because the trial judge makes the decision whether to grant probation when he delivers his judgment at the end of the trial. By contrast, the decision whether to grant parole is made by an administrative body years later.

Even if § 1103(a) had never been enacted, and the more far-reaching provisions of 1 U.S.C. § 109 governed this case, the no-parole proviso would not survive its repeal, because § 109 applies only to substantive rights and penalties, and not to procedures and remedies. The no-parole proviso is basically forum-defining, and therefore procedural and

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course, the *amicus* would also benefit from a ruling eliminating the mandatory-minimum sentence proviso, since upon a re-sentencing the judge might decide to give him a more "creative" sentence involving perhaps a combination of time to be served and time suspended with probation.

remedial rather than substantive. Parole statutes do not necessarily reduce or increase penalties; they merely designate the tribunal which makes the final decision about the length of a defendant's imprisonment. To the extent that § 7237(d) did have the effect of increasing penalties, that effect can be "saved" without saving the procedural aspects of the no-parole proviso.

Even if in an indictment charging a substantive offense occurring prior to May 1, 1971, the saving provisos save the statute and penalty provisions and provisions relating to parole eligibility, nevertheless in an indictment for conspiracy where the repeal occurred in mid-conspiracy, the penalty provisions of the new statute should apply. A conspiracy is a continuing offense, and the point of "occurrence" of the conspiracy for purposes of legal analysis is the end, rather than the beginning of the conspiracy. Hence, the statute and penalty in effect at the end of the conspiracy should govern such cases.

Argument.

I. The Proviso in U.S.C. § 7237(d) Prohibiting Consideration for Parole does Not Apply to Persons Sentenced After its Repeal.

A. *The No-Parole Proviso in § 7237(d) has Not been Kept Alive by the Savings Clause of P.L. 91-513 because Consideration for Parole does Not Affect or Abate a "Prosecution."*

P.L. 91-513, which repealed the no-parole proviso in former § 7237(d) of Title 21, contains a savings clause, § 1103(a), which provides that

> "Prosecutions for any violation of law occurring prior to the effective date of section 1101 shall not be

affected by the repeals or amendments made by such section . . . or abated by reason thereof."

Under this language, the question of whether a provision repealed by P.L. 91-513 is "saved" by § 1103(a) depends solely upon whether its abandonment would "affect" or "abate" a "prosecution."[2]

To hold that consideration for parole affects or abates a "prosecution" requires stretching of the meaning of "prosecution" beyond the bounds of common sense. As this Court stated in *Morrissey* v. *Brewer*, U.S. , 40 U.S.L.W. 5016, 5018, "Parole arises after the end of the criminal prosecution, including imposition of sentence. . . ." Parole decisions are made by a nonjudicial body months or years after prosecution ends.

Two maxims of statutory construction aid the conclusion that parole consideration does not affect "prosecution." First, as a savings clause, § 1103 is in derogation of common law and hence must be construed narrowly. See *United States* v. *Auerbach*, 68 F. Supp. 776 (S.D. Cal. 1946) (commenting on the general federal savings statute).[3] More

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[2] The general savings clause, 1 U.S.C. § 109, is superseded by the subsequently enacted specific language of § 1103(a). Otherwise, § 1103(a) would be completely superfluous; if it did not serve to limit § 109, it would have no other conceivable function. See generally brief of petitioners at 9-13. However, even if § 1103 had never been enacted, § 109 would not save the no-parole proviso of § 7237(d) because the no-parole proviso is procedural, not substantive. See pp. 15-20, *infra*.

[3] At common law, the repeal of a statute nullified it completely. No liability incurred under the statute could be enforced, and even pending prosecutions were abated. See *United States* v. *Stephens*, 449 F. 2d 103, 105, n. 6 (9th Cir. 1971). See generally Ruud, The Savings Clause—Some Problems in Construction and Drafting, 33 Tex. L. Rev. 284, 290, n. 23 (1955); Million, Expiration or Repeal of a Federal or Oregon Statute or Regulation as a Bar to Prosecution for Violations Thereunder, 24 Ore. L. Rev. 25 (1944).

fundamentally, the clause relates to a criminal statute, and hence any doubt must be resolved in favor of lenity:

> "It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." *Bell* v. *United States*, 349 U.S. 81, 83, 75 S.Ct. 620, 622 (1955).
>
> "[W]hen reasonable doubt exists as to whether provisions of a statute that are penal in effect have been repealed, such doubt should be resolved against the government." *United States* v. *One Airplane*, 23 F. 2d 500 (S.D. Cal. 1927).

One of the central goals of P.L. 91-513 was to permit greater flexibility in the punishment and treatment of drug offenders. The minimum-mandatory, no-probation and no-parole provisions of the acts repealed by P.L. 91-513 were highly controversial. The no-parole provision constituted a particularly severe departure from rehabilitative ideals. The House Report on P.L. 91-513 shows that Congress knew that the repealed law conflicted with modern ideas of penology:

> "The modern concept of criminology should apply — that penalties fit offenders as well as offenses. Penalties should be designed to permit the offender's rehabilitation whenever possible. Although society must often be protected from the offender for a time, penalties in specific cases should recognize the need for reformation." U.S. Code Cong. & Adm. News (91st Cong., 2d Sess., 1970) 4575 (quote from Prettyman Commission Report by Committee).

After noting that the mandatory penalty provisions had been abolished in the new bill (with one narrow exception)[4] the House Report stated that:

> "The foregoing sentencing procedures give maximum flexibility to judges, permitting them to tailor the period of imprisonment, as well as the fine, to the circumstances involved in the individual case.
>
> "The severity of existing penalties, involving in many instances minimum mandatory sentences, have led in many instances to reluctance on the part of prosecutors to prosecute some violations, where the penalties seem to be out of line with the seriousness of the offense. In addition, severe penalties, which do not take into account individual circumstances, and which treat casual violators as severely as they treat hardened criminals, tend to make convictions somewhat more difficult to obtain. The committee feels, therefore, that making the penalty structure in the law more flexible can actually serve to have a more deterrent effect than existing penalties, through eliminating some of the difficulties prosecutors and courts have had in the past arising out of minimum mandatory sentences." U.S. Code Cong. & Adm. News, *id.*, at 4576. *See id.*, at 4636 (Senate Report).

The important policy change in punishment was also pointed out in debate. Congressman Bush of Texas said that

> "The bill eliminates mandatory minimum penalties, except for professional criminals. Contrary to what one might imagine, however, this will result in better

[4] See 21 U.S.C. § 848, which provides a minimum mandatory penalty for persons proven to have derived substantial income from managerial positions in illegal drug rings.

justice and more appropriate sentences. For one thing, Federal judges are almost unanimously opposed to mandatory minimums, because they remove a great deal of the court's discretion. . . .

"The penalties in this bill are not only consistent with each other, but with the rest of the Federal criminal law—something which cannot be said for present drug laws. As a result, we will undoubtedly have more equitable action by the courts, with actually more convictions where they are called for, and fewer disproportionate sentences." 116 Cong. Rec. 33314 (1970) (remarks of Representative Bush). See also *id.*, at 1182 (remarks of Senator Thurmond) and *id.*, at 35051 (remarks of Senator Dodd).

A harsh construction of the savings clause in P.L. 91-513 would conflict with the bill's fundamental goal of permitting the punishment to be tailored to fit the individual. It would continue, for many years, to perpetuate an anomalous and unjust proviso which, in narcotics cases, deprived the parole board of powers it retained in cases involving far more heinous crimes. See, *e.g.*, 18 U.S.C. § 1201 (kidnapping); 18 U.S.C. § 1751 (presidential assassination); 18 U.S.C. § 2381 (treason). Moreover, persons who committed the same illegal acts and were tried at the same time would be treated very differently depending upon whether their crimes occurred before or after the date of repeal. Congress has indicated that a major purpose of the new drug law is to eliminate, with one narrow exception, a harsh provision which is found in no other federal criminal statute. This purpose should not be frustrated.

Some lower courts have held that the no-parole and no-probation provisos of § 7237(d) "affect" the "prosecution" within the meaning of § 1103, and hence survive the repeal of § 7237(d). See, *e.g.*, *United States* v. *Bradley*, 455

F. 2d 1181, 1191 (1st Cir. 1972); *United States* v. *Caldwell*, No. 72-1200 (3d Cir., July 5, 1972); *United States* v. *Ross*, No. 72-1135 (2d Cir., June 13, 1972); *United States* v. *Robinson*, 336 F. Supp. 1386, 1387 (W.D. Wis. 1972). *Contra*, *United States* v. *Stephens*, 449 F. 2d 103, 105 (9th Cir. 1971); *United States* v. *McGarr*, No. 72-1108 (7th Cir., April 28, 1972). These decisions rely upon the notion that "sentencing" is a part of "prosecution" since a criminal trial is not final for purposes of appeal until after sentence has been imposed. See *Berman* v. *United States*, 302 U.S. 211, 58 S. Ct. 164 (1937); *Korematsu* v. *United States*, 319 U.S. 432, 63 S. Ct. 1124 (1943). The attempt to define "prosecution" in terms of the rules about when an appeal may be taken is a sterile exercise in word-juggling. The question of whether imposition of sentence makes a trial final for purposes of permitting appeal has nothing whatever to do with the issue of whether certain incidents of a criminal penalty are included within the concept of "prosecution" under a savings clause. It is wrong to take out of context statements that sentencing marks the final judgment[5] and to attempt to mold them into a definition of "prosecution" for savings clause purposes. This is not the Heaven of Juristic Concepts in which each term has exactly the same meaning in every context. Even if the word "prosecution" were commonly used (which it is not[6])

[5] *E.g.*, the passage in *United States* v. *Robinson*, 336 F. Supp. 1386, 1387 (W.D. Wis. 1972), quoting *Berman* v. *United States*, 302 U.S. 211, 58 S. Ct. 164 (1937).

[6] The availability-of-appeal decisions, which are concerned with concepts of "finality" and "judgment" do not actually use the word "prosecution" very much. For example, the much-quoted case of *Berman* v. *United States*, 302 U.S. 211 (1937) ("[t]he sentence is the judgment"), never uses the word "prosecution." The ultimate misuse of availability-of-appeal rules occurs in *United States* v. *Ross*, *supra*, slip opinion at 3479, which states that "[F]or purposes of appeal, a prosecution is not complete until

in cases and statutes dealing with the availability of appeal, that word could well have a different meaning when used in a savings clause, since it would serve an entirely different purpose. Cf. *Sampson* v. *Channell*, 110 F. 2d 754 (1st Cir. 1940), cert. den. 310 U.S. 650 ("substance" and "procedure" have different meanings depending upon purpose for which used).

The issue now before the Court is not when a criminal conviction becomes appealable, but what the word "prosecution" refers to in a savings clause. Statutes use "familiar legal expressions in their familiar legal sense." *Henry* v. *United States*, 251 U.S. 393, 395 (1920) (Holmes, J.). In its usual sense, "prosecution" refers to a proceeding instituted "for the purpose of determining the guilt or innocence of a person charged with crime." Black's Law Dictionary at 1385 (Revised 4th Edition, 1968). It is distinguished in general usage from concepts such as "investigation" (pre-prosecution) and "punishment" (post-prosecution).[7] Obviously, a statute providing that "prosecu-

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sentence is imposed. Fed. R. App. P. 4(b)." The cited rule says nothing about the nature of a "prosecution," but merely requires that a notice of appeal be filed within 10 days of a criminal judgment, and that a notice filed prior to judgment be treated as filed as of the day of judgment. The word "prosecution" is not used in the rule.

[7] A now-repealed section in the Revised Statutes of 1874 illustrates the dichotomy of "prosecution" and "punishment" in the popular legal usage by treating them as separate concepts to be saved separately:

> "Sec. 5598. All offenses committed, and all penalties or forfeitures incurred under any statute embraced in said revision prior to said repeal, may be *prosecuted and punished* in the same manner and with the same effect, as if said repeal had not been made." Quoted in *United States* v. *Obermeier*, 186 F. 2d 243, 251 (2d Cir. 1950), cert. denied, 340 U.S. 951. (Emphasis added.)

tions" not be "affected" preserves the definition of a repealed offense, insures that the same elements of proof are required, and maintains any evidentiary presumptions built into the prior statute.[8] Moreover, it can reasonably be argued that if no penalty were impossible, the "prosecution" would be "affected," since the absence of any penalty would remove much of the importance of a finding of guilt. See *United States* v. *McGarr, supra,* slip opinion at 4-5. However, to hold that every incidental variation upon punishment "affects" a "prosecution" goes too far. The concept of "affecting" a "prosecution" in P.L. 91-513, § 1103, must be given a meaning more limited than the concept of maintaining a prior "penalty" under U.S.C. § 109, or the latter statute would be merely superfluous, something Congress must be presumed not to have intended.[9] *Cf.* Kauper, *Federal Trade Commission* v. *Jantzen*: Blessing, Disaster, or Tempest in a Teapot? 64 Mich. L. Rev. 1523, 1527-1528 (1966).

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[8] *See* 21 U.S.C. § 174 (presumption of knowledge that drug was imported).

[9] It would be frivolous to argue that the passage of § 1103 was inadvertent and that no effect upon § 109 was intended. Section 1103(b), relating to civil actions, manifests an unmistakable intent to modify the effect of § 109 by providing that:

> "Civil seizures or forfeitures and injunctive proceedings commenced prior to the effective date of section 1101 shall not be affected by the repeals or amendments made by such section or section 1102, or abated by reason thereof." 84 Stat. at 294.

This section saves the controversial forfeiture provisions of prior law only where proceedings have already begun, whereas § 109 would have preserved vested forfeiture liabilities regardless of whether suit had already begun.

If either statute was passed inadvertently, it was § 109, not § 1103. The legislative history of § 109 suggests that Congress did not realize that the drafted language could be interpreted to make sweeping changes in the common law. *See* MacKenzie, Hamm v. City of Rock Hill and the Federal Savings Statute, 54 Geo. L. J. 173 (1965).

Even if the savings clause in § 1103(a) could be construed to save the *no-probation* proviso of § 7237(d), the *no-parole* proviso should die with the repeal. The two provisos are distinguishable for savings clause purposes.[10] The determination whether to grant *probation* is made by the trial judge at sentencing. Arguably, that decision affects the "prosecution," if the "prosecution" can be viewed as extending from indictment through judgment. See, *e.g.*, *United States* v. *Bradley*, 455 F. 2d 1181, 1191 (1st Cir. 1972); *United States* v. *Caldwell*, No. 72-1200 (3d Cir., July 5, 1972), slip opinion at 5-6. *Contra*, *United States* v. *Stephens*, 449 F. 2d 103, 105 (9th Cir. 1971). In contrast, consideration for *parole* takes place months or years after judgment, and the decision is made by officers of the executive branch, not the trial judge.

Lower court cases holding that § 7237(d) is saved by § 1103 have failed to recognize the distinction between probation and parole. See *United States* v. *Bradley*, *supra*; *United States* v. *Ross*, *supra*; *United States* v. *Caldwell*, *supra*; *United States* v. *Robinson*, *supra*. This omission stands out most vividly in *United States* v. *Ross*, *supra*, which seems to base its conclusion that prosecution includes sentencing partly upon the fact that the sentence is written on the same piece of paper as the judgment.[11] Yet while the paper setting forth the judgment and sentence contains language committing the defendant to custody for a certain

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[10] Defendant Bradley argues forcefully that *neither* proviso survives the repeal of § 7237(d). See brief of Petitioner at 13-18. *Amicus* De Simone does not quarrel with this argument, but merely wishes to point out that the two provisos are not necessarily in the same boat.

[11] "An essential ingredient of any prosecution is sentencing. Indeed, the Federal Rules of Criminal Procedure provide that a judgment of conviction must set forth the defendant's sentence, in addition to the plea, the verdict and the adjudication." Slip opinion at 3479.

term of years, it commonly contains no notation about parole,[12] about any other variation on imprisonment, or about early release because of accrued good time.[13] Those matters are not decided by the judge as part of sentencing, but are left to the discretion of executive officers within the leeway given them by law. The procedure thus differs sharply from that used for suspending sentence and imposing probation.

Even if the judgment (including sentence) is viewed as part of the "prosecution," parole rules are not part of the judgment unless a "judgment" consists not only of the express directions of the trial judge, but also all of the incidents of punishment provided for by law at the time of its pronouncement. Under this concept, the "judgment" would include the rules for conditional release on parole, 18 U.S.C. § 4202 *et seq.*, for conditional release by reason of accrued good time, 18 U.S.C. §§ 4161, 4164, for funeral or sick leave, 18 U.S.C. § 4082(c)(1), and for work-release programs, 18 U.S.C. § 4082 (c)(2). A mere liberalization of the rules of the work-release program would "affect" the "prosecution" of a person previously sentenced under this view of the scope of judgment. Such a result would be intolerable. Like work-release or funeral leave, parole is simply another variation upon the "custody" to which a

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[12] There is a limited exception for sentences imposed under 18 U.S.C. § 4208(a)(2).

[13] For example, the judgment in *amicus* De Simone's case merely recited that he was adjudged guilty under 21 U.S.C. §§ 173 and 174, and that "the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN (10) YEARS and FINED $20,000.00." See Appendix E. This form of sentence is required by 18 U.S.C. § 4082(a). Even if § 7237(d) were interpreted to bar eligibility for parole, De Simone will be eligible for early release if, as is usually the case, he accrues "good time" under 18 U.S.C. § 4161.

prisoner has been remanded under his sentence, and not part of the judgment. Cf. *Henratty* v. *Zerbst*, 9 F. Supp. 230, 231 (D. Kan. 1934), appeal dismissed, 77 F. 2d 1023 (10th Cir. 1935):

> "While time spent on parole is a lower grade of punishment, the prisoner is none the less in the legal custody of the warden and confined within specified bounds. As long as the parole conditions are not breached he is absent from the prison with the permission of the authorities. He is not a free man but rather a prisoner with many privileges which have been accorded him because he is deemed trustworthy. He is a 'trusty' with enlarged bounds."

B. *The Proviso in Section 7237(d) Taking Jurisdiction Away from the Parole Board is Procedural and Remedial, Not Substantive, and Hence is Not Preserved by Any Savings Clause.*

Even if P.L. 91-513, § 1103 and 1 U.S.C. § 109 could be construed together so as to extend beyond merely saving provisions which affect "prosecutions," the no-parole proviso of section 7237(d) would still die on the date of its repeal. The no-parole proviso is basically procedural and remedial, not substantive. It simply changes the tribunal which determines the date of a defendant's release, without altering substantive rights and liabilities. Cf. *United States* v. *Stephens*, *supra*, 449 F. 2d at 105, n. 8.

Normally, the sentence pronounced by a federal judge is a flexible one. For example, a 15-year sentence will actually entail between 5 and 15 years of imprisonment.[14] Juris-

[14] See 18 U.S.C. § 4202 (parole board has jurisdiction to consider prisoner for conditional release after one-third of sentence served). For simplicity, the statutory provisions for early release because of accumulated "good time" will be ignored in this brief except where otherwise stated. See 18 U.S.C. § 4161.

diction to set the date of conditional release, within the minimum-maximum limits, is delegated by statute to the parole board. Like the trial judge, the parole board makes a discretionary sentencing decision, considering roughly the same factors of rehabilitation, deterrence, and punishment considered by the judge,[15] but with the benefit of information about the subject's behavior in prison.

The availability of parole does not, of course, mean that every defendant spends less time in prison than he would if it were not available. Judges, knowing of parole, are likely to set higher maximum sentences. Uncooperative prisoners can actually spend more time in prison than they would if the trial court were the only sentence-determining tribunal.[16]

It is settled that a statute which affects remedies and procedures, and not substantive rights or penalties, is not covered by the savings clause of 1 U.S.C. § 109. See *Great Northern Ry. Co.* v. *United States*, 208 U.S. 452 (1908); *Hertz* v. *Woodman*, 218 U.S. 205, 218 (1910) ("remedies and procedure" contrasted with "penalties, forfeitures and liabilities"); *Hallowell* v. *Commons*, 239 U.S. 506 (1916); *De La Rama Steamship Co., Inc.*, v. *United States*, 344 U.S. 386 (1953). See generally *United States* v. *Obermeier*, 186 F. 2d 243, 250-257 (2d Cir. 1950), cert. den. 340 U.S. 951 (1951) (extensive discussion of Supreme Court cases by Frank, J.).

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[15] See 18 U.S.C. § 4203(a), containing statutory standards for release.

[16] Moreover, should parole be revoked, the prisoner may have to serve his entire original sentence without credit for parole time, 18 U.S.C. § 4205, and in addition he may forfeit his previously accumulated "good time." 18 U.S.C. § 4165. His total time in "custody"—under parole supervision and in prison—will then be longer than it would have been had he never been granted parole, and even his total time of actual imprisonment will be longer if he serves his maximum sentence and forfeits some of the good time because of the revocation.

In *Hallowell* v. *Commons,* 239 U.S. 506, 36 S. Ct. 202 (1916) (Holmes, J.) the plaintiff, an Omaha Indian, sued to establish his title to certain lands held in trust by the United States. The suit was commenced under a statute conferring jurisdicion on the federal district courts. During the pendency of the suit, Congress passed a statute returning exclusive jurisdiction to the Secretary of the Interior. The Secretary was given considerable discretion, and his decision was to be final and conclusive. The plaintiff, dissatisfied with this new forum, claimed that Rev. Stat. § 13 (now 1 U.S.C. § 109) saved his suit from dismissal. The Supreme Court disagreed, saying that the new statute did not take away any substantive right, but merely "change[d] the tribunal that is to hear the case." 239 U.S. at 508. The plaintiff had to pursue his remedy under the "quasi-paternal supervision of the general head of Indian affairs." *Id.* The *Hallowell* statute is similar to P.L. 91-513 since both Acts take an area of responsibility away from the federal courts and revest it to the discretion of executive officers. The mere fact that a party feels, even justifiably, that the executive body may be less favorable to him than a court does not make the nature of the change any less "procedural" or any more "substantive."

That the restoration of the Parole Board's jurisdiction over persons sentenced for narcotics violations after the effective date of the repeal of § 7237(d) might be viewed as benefiting defendants more than the government does not make the change "substantive" rather than "remedial." [17] No one would claim that a statute restoring a

[17] As pointed out on page 16, *supra,* trial judges may be expected to give higher sentences under a parole-eligible statute than under a no-parole statute. As for defendants already sentenced, the parole board can make allowances if it finds that a defendant received a lower sentence because the judge was under the impression that the no-parole statute applied. Restoration of parole consideration does not give any prisoner a guarantee of early release;

form of collateral attack upon judgments was "substantive" instead of "procedural" simply because only defendants would benefit from it. Nor is the reduction of a statute of limitations from five to three years substantive simply because it only benefits defendants, not the government:

> "Since 1 U.S.C.A. § 109 . . . saves merely substantive 'rights' and 'liabilities,' we think it does not save limitation statutes as to past offenses. For usually, a statute of limitations is considered no part of a 'right' or 'liability,' but as affecting the 'remedy' only." *United States* v. *Obermier, supra,* 186 F. 2d at 254.

The substance-procedure distinction is elusive at times, but it serves a useful function:

> "The abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value." *Chase Securities Corp.* v. *Donaldson,* 325 U.S. 304, 314 (1945).

Clearly flexibility is the more important value in the instant case. No one's legitimate expectations will be upset by permitting persons sentenced under the old narcotics laws to receive parole consideration. When Congress passed the original parole statute in 1910 it was quite willing to place modern penal theory above the "stability" of sentences already imposed by providing that "[E]very

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it simply gives the executive branch more flexibility in rehabilitating prisoners and in balancing the cost of incarceration against its benefits.

prisoner *who has been or may hereafter be* convicted of any offense . . . and who has served one-third of the total of the term or terms for which he was sentenced, may be released on parole as hereinafter provided." Act of June 25, 1910, c. 387, § 1, 36 Stat. 819. (Emphasis added.) Congress made the same value judgment in 1966 when it directed the Parole Board to consider release of persons confined under no-parole marihuana sentences. P.L. 89-793, § 502, 80 Stat. 1449.

In only one limited situation can an argument be made that the no-parole provision is as much of a penalty-defining provision as it is a forum-designating provision. When taken together with some of the minimum mandatory provisions of the former narcotics laws, the no-parole provision had the effect of setting an absolute minimum time which a defendant would be required to serve in prison. For example, 21 U.S.C. § 174 provided a sentence of 5 to 20 years for first offenders. But for the no-parole provisions of section 7237(d), a prisoner sentenced to five years might have been released in one-third time. With section 7237(d) in effect, a prisoner sentenced to five years would absolutely have to serve the five years minus "good time" — an actual total of approximately three years, eight months. See 18 U.S.C. § 4161. However, even if the revesting of jurisdiction in the Parole Board to conditionally release narcotics violators could be considered a substantive rather than procedural or remedial change because of its influence upon minimum mandatory penalties, § 7237(d) should be saved by 1 U.S.C. § 109 only to the extent that it has such a "substantive" effect. The penalty-designating effect of the no-parole provision of § 7237(d) could easily be saved simply by restricting parole consideration to prisoners who have served at least the minimum mandatory sentence minus good time. All the other effects of the no-parole proviso are forum-defining and jurisdictional, and therefore cannot be saved by 1 U.S.C. § 109 or P.L. 91-513, § 1103.

II. Even if This Court Resolves the Issues Raised in the Bradley Case against the Petitioners, it should Not Do so by Use of Language so Broad as to Determine the Question in the De Simone Case without Allowing De Simone his Day in Court.

A. *The De Simone Case Involves a Conspiracy which Continued even After the Repeal of 21 U.S.C. § 174.*

While the *amicus* De Simone presents in his case some issues which are identical to those raised by the Petitioners in the *Bradley* case, and while De Simone strongly supports Bradley's arguments with respect to the nonapplicability of the mandatory minimum, non-parolable sentence provisions to both the Bradley petitioners and to the *amicus*, nevertheless the *amicus* wishes to point out to the Court that his case presents a fact pattern which is significantly different from that of the *Bradley* case. More importantly, the fact pattern in Mr. De Simone's case is such that his case need not necessarily be decided in the event that this Court decides to rule against the contentions of the *Bradley* petitioners, for although a pro-Bradley ruling would necessarily benefit Mr. De Simone, a ruling adverse to Bradley need not, and should not, decide the De Simone issue.

The difference between the two cases lies in the fact that De Simone is charged only with a conspiracy to violate Title 21, United States Code, Sections 173 and 174. Conspiracy is classically an on-going and continuing offense. *Hyde* v. *United States*, 225 U.S. 347, 369, 32 S. Ct. 793, 803 (1912). In the De Simone indictment (App. A), the defendant is charged with an offense which began on December 1, 1967, and which continued until June 2, 1971, the date of the indictment. Among the four overt acts charged, three occurred prior to the May 1, 1971 "cut-off" date, while the fourth and, indeed, crucial overt act occurred after May 1 and hence after the sentencing provisions of the Compre-

hensive Drug Abuse and Prevention Act took effect. The Defendant's plea of guilty to the indictment, just as a jury's general verdict of guilty, necessarily is a plea of guilty to each and every element of the indictment. *United States* v. *Spock*, 416 F. 2d 165, 181 (1st Cir. 1969); *United States* v. *Shackelford*, 180 F. Supp. 857 (S.D. N.Y. 1957). Hence, De Simone's crime was a continuing one, in the middle of which the statute changed, along with the penalty. This fact has several crucial implications which we shall examine, *infra*.

B. *In a Continuing Conspiracy Case, where the Statute and/or Penalty have been Altered in Mid-Conspiracy, the Penalty Obtaining at the Close of the Conspiracy Governs the Sentence to be Imposed.*

Many cases present examples of criminal conspiracy statutes or penalty provisions being altered while a conspiracy is proceeding. Frequently, courts have adhered to the doctrine which dictates that in such cases, the sentencing court should impose sentence under the standard obtaining in the latter part of the conspiracy. Perhaps coincidentally, or perhaps because of a general modern trend toward harsher criminal penalties, most of these cases present fact situations where the later statute or penalty is found to be harsher than the earlier one. In such cases the courts have seen fit to impose the harsher penalty, despite the general maxim that in criminal cases, any doubt should be resolved in favor of lenity. See *Bell* v. *United States*, 349 U.S. 81, 83-84, 75 S. Ct. 620, 622 (1955).

Thus, in *Huff* v. *United States*, 192 F. 2d 911 (5th Cir. 1951), the defendants were convicted for conspiracy to violate the Internal Revenue laws relating to distilled spirits. At the time the conspiracy commenced, the statute (being the general federal conspiracy statute, the precursor of the

current 18 U.S.C. § 371) provided a prison sentence of not more than two years. While the conspiracy was transpiring, the statute was amended and the penalty was increased to five years. The defendants, wanting to take advantage of the earlier, more lenient penalty provision, argued that since "the offense of conspiracy is complete upon the meeting of minds in an agreement for a violation of a federal statute," therefore "persons so conspiring are subject to prosecution upon the commission of the first overt act." They further argued that since the crime was complete while the old statute was in effect, they had to be sentenced under the old, rather than under the new statute. (At 914.) The Court of Appeals for the Fifth Circuit held that it was proper to sentence under the later, harsher provision, and that this did not constitute an *ex post facto* law. See also *People* v. *Walczak*, 315 Ill. 49, 145 N.E. 660, and *State* v. *Hayes*, 127 Conn. 543, 18 A. 2d 895.

In one of the most carefully and fully reasoned opinions on the subject, the Ninth Circuit held that an increased penalty enacted in mid-conspiracy *must* be applied. In *Leyvas* v. *United States*, 371 F. 2d 714 (9th Cir. 1967), the conspiracy was formed, and all of the overt acts occurred prior to the amendment of the statute, but the court relied on the fact that, no matter when the overt acts were committed, the body of the indictment charged a conspiracy which continued until after the new, harsher statute was in effect.[18] The Court remanded to the district court judge for imposition of the longer sentence.

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[18] The Court pointed out that in cases involving 21 U.S.C. § 174, the conspiracy need not be evidenced by an overt act. It is only the dates charged in the body of the indictment, and not the overt acts, which sets the limits for the beginning and the end of the conspiracy. This, of course, negates any effect flowing from the sentencing judge's apparent attempt in the De Simone case to confine the conspiracy to the pre-amendment period by declaring the fourth, post-amendment overt act to be "out of the scope of

Ironically, *Leyvas* was sentenced under a harsher statute because the penalty provision related to 21 U.S.C. § 174 was made *harsher* in mid-conspiracy. De Simone was sentenced under a harsher statute because the 21 U.S.C. § 174 sentencing provision was made *less harsh* in mid-conspiracy! It would appear, at the very least, that a spirit of fair-minded, even-handed administration of the criminal laws was absent in at least one of these two cases. The weight of the law indicates that it was absent in the De Simone situation. If the trial court in *Leyvas* did not have the power to choose between sentencing under the old or under the new statutes, then the trial court here should not have such a choice. The legislative intent cannot be so arbitrary as to allow for precisely contrary applications of the rules of statutory interpretation merely in order to attain a harsher result in each case.

C. *Generally, a Conspiracy is Considered to Take Place at the Latest, rather than at the Earliest, Date in Cases Where it is Necessary to Pinpoint the Conspiracy in Time.*

Various situations arise in legal contexts where it is necessary to pinpoint the time of "occurrence" of a continuing conspiracy. For example, the date for tolling the statute of limitations in a conspiracy is the latest date that the conspiracy existed. The statute runs from the termi-

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the indictment." (Appendix B.) Moreover, the *Leyvas* court held that in cases where the dates of the overt acts are determinative of the date of the offense in conspiracy cases, it is the last overt act which counts. *Id.*, at 717.

nation, rather than from the commencement, of the conspiracy. *United States* v. *Kissel*, 218 U.S. 601 (1910); Developments in the Law—Conspiracy, 72 Harv. Law Rev. 920, 961-962 (1959); *Hyde* v. *United States*, 225 U.S. 347, 32 S. Ct. 793 (1912). And where a conspiracy is initiated at a time when the object thereof is not criminal, but where a statute is passed in mid-conspiracy making the object criminal, and where the conspiracy continued beyond the effective date of the criminal statute, it is the latter part of the conspiracy which is taken into account for purposes of determining liability. *Christianson* v. *United States*, 226 F. 2d 646 (8th Cir. 1955).

Furthermore, the "occurrence" of the crime of conspiracy cannot be pinpointed at the earlier portion because of the peculiar problems attached to voluntary withdrawal from a continuing crime. It is established that a defendant may at any time voluntarily withdraw from a conspiracy by renouncing participation. In some cases, such withdrawal may even have the effect of relieving the man of criminal liability. *People* v. *Moren*, 166 Cal. App. 2d 410, 415, 333 P. 2d 243, 246 (4th Dist. C. T. App. 1958). See also Wechsler, Jones and Korn, The Treatment of Inchoate Crimes in the Model Penal Code, 61 Colum. L. Rev. 957, 1003-1006 (1961). But at the very least, withdrawal relieves a former participant from liability for acts committed after his renunciation of membership. *People* v. *Moren*, *Id.* See also 72 Harv. Law Rev., *supra*, at 957. In this sense, total, irrevocable liability for the conspiracy is not incurred until it is either broken up by the authorities or until it has accomplished its purpose and ended of its own accord.

This matter of the point at which irrevocable liability is incurred in a conspiracy is not without importance when analyzing the effect of a savings clause or statute in a situation such as that of Mr. De Simone. In *Hertz* v. *Woodman*, 218 U.S. 205, 30 S. Ct. 621 (1910), the Court dealt with a

question of the obligation to pay an estate tax where the taxing statute involved had been repealed after the death of the testator. The Court went deeply into the "liability incurred" feature of the general federal savings statute and concluded that since the event which sealed the tax liability occurred prior to repeal, the savings statute served to save the statute for purposes of federal collection of the tax after the repeal. The crucial fact was that "the law, then unrepealed and in full force, operated to fasten, at the moment this right of succession passed by death, a liability for the tax imposed . . . ." And, equally important, "the occurrence of no other . . . event was essential to the imposition of a liability for the statutory tax upon the interest thus acquired." 218 U.S. at 220, 30 Sup. Ct. at 625. See also *Deal* v. *Federal Housing Administration*, 260 F. 2d 793 (8th Cir. 1958).

Conclusion.

For the above-discussed reasons, this Honorable Court should reverse the opinion and judgment of the United States Court of Appeals for the First Circuit in No. 71-1304 (O.T. 1972), and declare that the mandatory minimum no-probation sentence provisions and the deprivation of parole eligibility do not apply to defendants indicted or convicted or sentenced on or after May 1, 1971. Even if the Court holds that the mandatory-minimum no-probation

sentence provisions should be applied to such defendants, the no-parole provision should not apply. If this Court should rule that both the sentence and no-parole provisions apply, it should avoid making such a ruling in the context of an on-going conspiracy in the midst of which the old statute was repealed and was replaced by the Comprehensive Drug Abuse and Prevention and Control Act of 1970.

Respectfully submitted,

HARVEY A. SILVERGLATE,

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65A Atlantic Avenue,

Boston, Massachusetts 02110,

Counsel for *amicus* Ralph De Simone.

Of Counsel:

ZALKIND & SILVERGLATE,

Boston, Massachusetts.

Appendix A

Indictment

United States District Court
Southern District of New York

UNITED STATES OF AMERICA,

v.

RALPH DE SIMONE, and
ANTHONY PAGLIUCA,
Defendants.

71 Cr. 587

The Grand Jury charges:

1. From on or about the 1st day of December, 1967 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, Ralph De Simone and Anthony Pagliuca, the defendants, and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate sections 173 and 174 of Title 21, United States Code.

2. It was part of the said conspiracy that the said defendants would unlawfully, wilfully, knowingly and fraudulently import and bring into the United States large quantities of narcotic drugs the exact amount and nature thereof being to the Grand Jury unknown.

3. It was further a part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would receive, conceal, buy, sell and facilitate the transportation, concealment and sale of a quantity of narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, after the said narcotic drugs had been imported

and brought into the United States contrary to law, knowing that the said narcotic drugs had been imported and brought into the United States contrary to law in violation of Sections 173 and 174 of Title 21, United States Code.

OVERT ACTS

1. In furtherance of the said conspiracy and to effect the objects thereof, on or about the 1st day of May, 1970, Guillermo Castillo named herein as a co-conspirator but not as a co-defendant, came to Seattle, Washington.

2. In furtherance of the said conspiracy and to further effect the objects thereof, on or about the 4th day of May, 1970, in the Southern District of New York, Anthony Fiotto, named herein as a co-conspirator but not as a co-defendant, came to the George Washington Hotel, 23rd Street, New York, New York.

3. In furtherance of the said conspiracy and to further effect the objects thereof, on or about the 9th day of March, 1971, Ralph De Simone came to the Chuck Wagon Restaurant, Fort Lee, New Jersey.

4. In furtherance of the said conspiracy and to further effect the objects thereof, on or about the 17th day of May, 1971, in the Southern District of New York, the defendants Ralph De Simone and Anthony Pagliuca came to the vicinity of the Sheraton Motor Inn, West 42nd and 12th Avenue, New York, New York.

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Foreman

WHITNEY NORTH SEYMOUR, JR.
United States Attorney

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

RALPH DE SIMONE, and
ANTHONY PAGLIUCA,
Defendants.

71 Cr. 587
72 Cr. 54

New York, New York
January 20, 1972
10:45 a.m.

Before

Hon. John M. Cannella, D.J.

Appearances

Whitney North Seymour, Jr., Esq.
United States Attorney, Southern District of New York

James LaRossa, Esq.
Attorney for Defendant DeSimone

Gerald Shargel, Esq.
Attorney for Defendant Pagliuca

(Plea—Defendant Ralph DeSimone only)

[2] Mr. LaRossa: If it pleases the Court, Defendant Ralph DeSimone has an application.

Mr. DeSimone wishes to withdraw his plea of not guilty previously entered, your Honor, and plead guilty to indictment 71 Criminal 587 at this time.

The Court: Would you come up here and sit down so that we can talk and the reporter can hear you. It will be easier for me to hear you and you to hear me.

Mr. LaRossa: May I stand over here, sir.

The Court: Yes, please.

. . . . . .

[9] The Court: The Court finds that this defendant is acting voluntarily, that he understands the nature of the charges against him, that he also understands the consequences of taking a plea in this case, and further, I find that the government is in a position to establish the charge herein, and therefore, I direct the Clerk of the Court to read the charge to the defendant.

Mr. LaRossa: Your Honor, he has read that a number of times, and I think we could waive the reading of it if your Honor chooses.

The Court: Tell you what I want to do. I want him [10] to hear again the first paragraph, which is the charge and then you can skip the means, which are the second paragraph, and then read at least one overt act. We shorten it.

You waive the entire reading?

A. I waive the entire reading, your Honor.

The Court: It is very short the part that I asked him to read, so suppose you listen carefully, because I want to make sure that you do know what you are pleading to.

The Clerk: You are Ralph DeSimone?

Defendant DeSimone: Yes.

The Clerk: That is your attorney sitting there?

Defendant DeSimone: Right.

The Clerk: "The Grand Jury charges that on or about the first day of December, 1967, and continuously thereafter up to and including the date of the filing of this indictment in the Southern District of New York and elsewhere, Ralph DeSimone, the defendant, and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 173 and 174 of Title 21, United States Code."

The Court: Now then since you waived the reading Paragraph 2 concerns the means by which it was to be done. [11] Paragraph 3 concerns the means by which it was to be done, and then, let's see, which overt act applies to you.

Mr. LaRossa: Three or four.

The Court: No. 4 is out of the scope of the indictment.

Mr. LaRossa: Three, sir.

The Court: All right, No. 3. And then the Clerk of the Court is directed to proceed from 1 and go to 3.

The Clerk: Overt Acts. "In furtherance of said conspiracy and to further the objects thereof, on or about May 1970, Giullermo Castillo, named herein as co-conspirator but not as a co-defendant came to Seattle, Washington."

"No. 3. In furtherance of the said conspiracy and to further effect the objects thereof, on or about the 9th day of March, 1971, Ralph DeSimone came to the Chuck Wagon Restaurant, Fort Lee, New Jersey."

Do you understand the charges just read to you?

Defendant DeSimone: Yes, sir.

The Clerk: You have previously pleaded not guilty to this charge. Do you now wish to withdraw your plea of not guilty and enter a plea of guilty to this charge?

Defendant DeSimone: I do.

The Clerk: How do you now plead?

Defendant DeSimone: Guilty.

[11a] The Court: All right, you may step down.

(Plea of Defendant Pagliuca follows.)

(Adjournment to March 6, 1972 for sentence.)

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

ANTHONY PAGLIUCA, 72 Cr. 54
Defendant.

The Grand Jury charges:

1. From on or about the 1st day of May, 1971 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, Anthony Pagliuca, the defendant, Ralph De Simone, named herein as a co-conspirator, but not as a co-defendant, and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841 (b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances to wit the substances commonly known as heroin and cocaine, the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

1. In furtherance of the said conspiracy and to effect the objects thereof, on or about the 17th day of May, 1971,

in the Southern District of New York, Anthony Pagliuca, the defendant, came to the vicinity of the Sheraton Motor Inn 42nd Street and 12th Avenue New York, New York at approximately 4:45 P.M.

2. In furtherance of the said conspiracy and to further effect the objects thereof on or about the 17th day of May, 1971, in the Southern District of New York, specifically in the vicinity of 46th Street and 12th Avenue, New York, Anthony Pagliuca took possession of a green briefcase.

3. In furtherance of said conspiracy and to effect the objects thereof on or about the 17th day of May 1971, in the Southern District of New York, Ralph De Simone, named herein as a co-conspirator but not as a co-defendant, came to the vicinity of the Sheraton Motor Inn, 42nd Street and 12th Avenue, New York, New York at approximately 4:45 P. M.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).), and Section 846.)

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Foreman

WHITNEY NORTH SEYMOUR, JR.

Appendix D.

[Seal]

OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D.C. 20530

July 25, 1972

Harvey A. Silverglate, Esq.
Zalkind & Silvergate
65a Atlantic Avenue
Boston, Massachusetts 02110

Re: Bradley v. United States
No. 71-1304, October Term, 1972

Dear Mr. Silverglate,

In response to the request in your letter of July 21, I hereby consent to your filing a brief amicus curiae in the above-entitled case on behalf of your client, Mr. Ralph DeSimone.

Very truly yours,
ERWIN N. GRISWOLD
Solicitor General

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THOMAS G. SHAPIRO
FRANCIS C. LYNCH, JR.

July 24, 1972

Harvey A. Silverglate, Esq.
Zalkind & Silverglate
65a Atlantic Avenue
Boston, Massachusetts 02110

Re: Bradley et al v. United States
United States Supreme Court No. 71-1304

Dear Mr. Silverglate:

I acknowledge your letter of July 21, 1972, asking whether I have any objection to your filing an *amicus curiae* brief on behalf of Ralph DeSimone, whose case is presently on appeal in the United States Court of Appeals for the Second Circuit.

I have no objection to your filing a brief *amicus curiae* in the above case.

Sincerely yours,
WILLIAM P. HOMANS, JR.

WPH:JB

EDWARD M. ALTMAN
ATTORNEY AT LAW

Tel. 864-6200
CENTRAL SQUARE BLDG.
678 MASSACHUSETTS AVE.
CAMBRIDGE, MASS. 02139

July 24, 1972

Attorney Harvey Silverglate
65A Atlantic Avenue
Boston, Massachusetts

Re: Bradley, Johnson, O'Dell and Helliesen
vs. United States of America

Dear Harvey:

My consent is hereby given for you to file a brief amicus curiae on behalf of your client, Ralph De Simone as an adjunct to the above entitled case.

Very truly yours,
EDWARD M. ALTMAN

EMA:ESK

864-6200 Office
484-5490 Residence

Stanley R. Lapon
Attorney at Law

Central Square Bldg.
678 Massachusetts Ave.
Cambridge, Mass. 02139

July 24, 1972

Attorney Harvey Silverglate
65A Atlantic Avenue
Boston, Massachusetts

Re: Bradley, Johnson, O'Dell and Helliesen
vs. United States of America

Dear Harvey:

My consent is hereby given for you to file a brief amicus curiae on behalf of your client, Ralph De Simone as an adjunct to the above entitled case.

Very truly yours,
Stanley R. Lapon

SRL:ESK

Appendix E.

JUDGEMENT AND COMMITMENT
UNITED STATES DISTRICT COURT
For The
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA
v. No. 71 Cir. 587
RALPH DE SIMONE

On this 6th day of March, 1972, came the attorney for the government and the defendant appeared in person and James La Rossa, Esq.,

IT IS ADJUDGED that the defendant upon his plea of guilty and the Court being satisfied there is a factual basis for the plea, has been convicted of the offense of unlawfully, wilfully and knowingly combining, conspiring, confederating and agreeing to violate Sections 173 and 174 of Title 21, U.S. Code. It was part of said conspiracy that the defendant would unlawfully, wilfully, knowingly and fraudulently import and bring into the U.S. large quantities of narcotic drugs. (Title 21, U.S. Code, Sections 173 and 174.) as charged and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN (10) YEARS and FINED $20,000.00. TOTAL FINE of $20,000.00 is to

be paid or the defendant is to stand committed until the fine is paid or the defendant is otherwise discharged according to law.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

JOHN M. CANNELLA
United States District Judge

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IN THE

Supreme Court of the United States

No. 71-1304

OCTOBER TERM, 1972

JAMES B. BRADLEY, JR., BYRON H. JOHNSON, ROBERT T. ODELL, JR., AND WILLIAM JAMES HELLIESEN,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR AMICI CURIAE

INTEREST OF SEVEN WOMEN PRISIONERS AS AMICI CURIAE

This amici curiae brief is filed, with the consent of counsel for the parties, on behalf of seven women prisoners presently confined at the Federal Reformatory for Women, Alderson, West Virginia. All were convicted and sentenced before May 1, 1971, the effective date of the Comprehensive Drug Abuse Preven-

tion and Control Act of 1970. All have served one-third or more of their sentences.

Having exhausted their administrative remedies with the United States Board of Parole, a suit on behalf of these seven women prisoners has been filed in the United States District Court for the Southern District of West Virginia. The suit is styled *Irene Alvarado, et al.* v. *Virginia McLaughlin, Warden, et al.*, Docket Number 1399.

As of June 30, 1972, the Federal Reformatory for Women had 554 residents. Of these, 127 had been sentenced for narcotic offenses (commitments under the Narcotic Addict Rehabilitation Act of 1966 not included).

The sentences of the latter group range from 5 to 25 years in length. Thirty-eight women were serving sentences considered to be nonparolable and 89 were serving parolable sentences. Of the women considered not eligible for parole, 32 had been sentenced before May 1, 1971, and 6 after that date. Of the women considered eligible for parole, 26 had been sentenced before May 1, 1971, and 63 after that date. (Appendix, *infra*, pp. 1a-3a.)

Although their suit in the Southern District of West Virginia is not a class action, the amici are representative of all thirty-eight women at the Reformatory serving administratively classified nonparolable sentences, as well as of other prisoners throughout the country serving similar sentences. The figures cited above illustrate the administrative difficulties the Bureau of Prisons has encountered in classifying sentences as parolable or nonparolable since the new drug act became effective on May 1, 1971. In his Memoran-

dum for the United States in response to the petition for certiorari in this case the Solicitor General pointed out that the question of eligibility for parole "comprehends all persons in custody who, regardless of the date of sentencing, were convicted of violating the old narcotic laws, which did not permit parole" and he agreed that the "inconsistency" between various circuits on this question calls for resolution by this Court (pp. 4-5). The lack of uniformity in administrative treatment demonstrated by the statistics furnished by the Warden of the Reformatory for Women (*supra*) equally calls for authoritative resolution of the question of parole eligibility of all persons imprisoned for violating the narcotics laws in effect prior to May 1, 1971. It is the position of amici that all such persons are eligible for parole, regardless of whether they were sentenced before or after that date.

ARGUMENT

I

All federal prisoners convicted of offenses against the narcotic laws of the United States are now eligible for parole, in accordance with applicable parole statutes, because Congress by repealing 26 U.S.C. 7237(d) has eliminated the only bar to such parole eligibility. This result is mandated by MORRISSEY V. BREWER, No. 71-5103, decided by this Court on June 29, 1972.

Several of the Courts of Appeals and District Courts have considered the effect upon persons convicted of federal narcotic offenses of the specific savings provision, § 1103(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Public L. No. 91-513, 84 Stat. 1236, and the effect of the general savings provision, 1 U.S.C. 109. None of these cases, however, has presented in clear and unclouded form

the question the amici present: did the repeal of 26 U.S.C. 7237(d) open the way for consideration for parole of persons convicted and sentenced before May 1, 1971, for offenses committed by them against the narcotic laws of the United States?

Between the two ends of the spectrum, that is, as between those persons who committed offenses after May 1, 1971, and are now clearly eligible for parole and those persons who committed offenses, were sentenced, and were in prison on May 1, 1971, there are a multiplicity of variations centering around the magic date, May 1, 1971. The amici join the Solicitor General in asking this Court to settle all these problems, as the United States Board of Parole should have done long ago. The amici contend that the only rational rule that can be declared in this situation is that *all* offenders against the narcotic laws of the United States are now eligible for consideration for parole in accordance with the parole statutes of the United States.

The amici think that the following cases support their position: *United States* v. *McGarr*, — F.2d — (C.A.7, No. 72-1108, April 28, 1972); *United States* v. *Fithian*, 452 F.2d 505 (C.A.9 1971); *United States* v. *Stephens*, 449 F.2d 103 (C.A.9 1971); *United States* v. *Pregerson*, 448 F.2d 404, 406 (C.A.9 1971); *United States* v. *King*, 335 F. Supp. 523, 555 (S.D. Cal. 1971).

Although clearly distinguishable on their facts, the amici recognize that the United States is relying upon the following cases as supporting a contrary position: *United States* v. *Bradley*, 455 F.2d 1181 (C.A.1 1972), the case now before this Court; *United States* v. *Fioto*, 454 F.2d 252 (C.A.2 1972); *United States* v. *Wooden*, 453 F.2d 1258 (C.A.2 1971); *United States* v. *Caraballo*, 334 F. Supp. 843 (S.D. N.Y. 1971, aff'd

without opinion October 7, 1972, by the Second Circuit); *Page* v. *United States,* 459 F.2d 467 (C.A.10 1972); *United States* v. *Robinson,* 336 F. Supp. 1386 (W.D. Wis. 1972).

There may be other recently reported cases; there most surely are other unreported cases.

These cases, though, have been superseded by the decision of this Court in *Morrissey* v. *Brewer,* No. 71-5103, handed down on June 29, 1972. The Court, in an opinion by Mr. Chief Justice Burger, reviewed "the function of parole in the correctional process", saying (Slip Op. 6):

> . . . Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison. The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence.

In light of this function, the Chief Justice said, "Parole arises after the end of the criminal prosecution, including imposition of sentence" (*id.,* 9). No member of the Court expressed disagreement with this analysis.

This conclusion—"Parole arises after the end of the criminal prosecution"—answers fully the question much discussed in the lower courts as to the limits of a "prosecution" within the meaning of the specific savings provision contained in § 1103(a) of the new

drug act. That provision preserves "prosecutions for any violation of law occurring prior to" May 1, 1971. *Morrissey* makes clear that parole is a matter separate from and unconnected with "prosecution".[1] Thus parole does not extinguish prosecutions which the savings clause preserves.

This construction of the specific savings clause should be dispositive of the question, for it is a recognized principle of statutory construction that a specific provision prevails over a general one.

Even if the general savings provision contained in 1 U.S.C. 109 is to be considered, *Morrissey* again provides the answer. That section preserves "any penalty, forfeiture or liability incurred under" a repealed statute. In *Morrissey* the Court characterized parole as "an established variation on imprisonment of convicted criminals" (*supra*, p. 5). As a "variation on imprisonment" it is a "penalty, forfeiture or liability" within the meaning of 1 U.S.C. 109. Thus again, parole does not extinguish any penalty, forfeiture or liability which the savings clause preserves.

II.

Equal protection of the law requires that the new drug act be construed to grant consideration for parole to all federal narcotic offenders.

When considering legislation challenged as violative of the guarantee of equal protection of the laws under the Fifth and Fourteenth Amendments, this Court has looked to the purpose of the legislation in resolving the constitutional issue. *See, e.g., Goesaert* v. *Cleary,*

[1] See also *Berman* v. *United States,* 302 U.S. 211, 212 (1937) ("Final judgment in a criminal case means sentence. The sentence is the judgment"); *Korematsu* v. *United States,* 319 U.S. 432, 435 (1943).

335 U.S. 464 (1948) (social and moral purposes attributed to statute providing for sexual classification in employment); *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582 (1961) (secular purpose attributed to Sunday closing law).

A prohibition against these amici prisoners being considered for parole eligibility solely because of the date on which their offenses were committed creates an indefensible and irrational classification of prisoners. Under such a classification, two prisoners of the same sex, same age, same background, same criminal record, and most importantly with the same potential for rehabilitation are treated differently, solely because of the dates of their offenses, or convictions, or sentences, or some similarly arbitrary and irrelevant criterion. One such prisoner with a fifteen-year sentence may be granted parole after serving one-third of her sentence, or five years, but another must remain in prison for the full fifteen years less good time and other statutory deductions, or for about ten years.

Watson v. *United States*, 439 F. 2d 442 (C.A. D.C. 1970), supports this view. The defendant in *Watson* had been convicted of two prior narcotic offenses and was, therefore, ineligible under Title II of the Narcotic Addict Rehabilitation Act of 1966, 18 U.S.C. 4251(f), for rehabilitative treatment. Another person with only one such conviction would have been eligible. The Court of Appeals for the District of Columbia Circuit held that to the extent that the Act denied qualified persons eligibility for updated rehabilitation programs, it violated the equal protection embodied in the Due Process Clause of the Fifth Amendment.

An analogy is found in the history of the federal "jail time" statute, 18 U.S.C. 3568. Before its enact-

ment in 1960, the federal courts often tacitly gave credit for the time offenders had spent in custody before formally beginning service of their sentences. However, in the absence of statutory authority, the courts did not credit with jail time an offender who had been given a mandatory minimum sentence. To correct this injustice, Congress required the Attorney General to give credit for jail time "... where the statute requires the imposition of a mandatory minimum sentence." Congress made no provision, however, for the automatic award of jail time credit against non-mandatory sentences. It may have been assumed that the courts would provide such credit as a matter of course, but the legislative history is silent on that point. Thus, when courts sometimes failed to provide jail time credit, a new and unforeseen discrimination developed: persons sentenced for less serious offenses, those not carrying a mandatory minimum, were denied the jail time credit that was automatically accorded to persons convicted of more serious offenses. *Stapf* v. *United States*, 367 F.2d 326, 328 (C.A. D.C. 1966). Congress corrected this new injustice in 1966 by amending § 3568 to require the Attorney General to credit all offenders with jail time. The 1966 amendment became effective in September, 1966. By its terms it had prospective effect only, thereby creating an additional discrimination between persons sentenced before the effective date and those sentenced after that date. Recognizing that the history of the 1960 and 1966 amendments demonstrated that the discrimination was unintentional, the District of Columbia Circuit in *Stapf* v. *United States, supra,* found the discrimination could easily be corrected.

> This is not a case, we reiterate, where Congress removed part of an evil but disclaimed action on the rest. This is a case, rather, where Congress

> acted as to the only evil that required legislative action, and assumed that in all other instances equivalent relief would be provided by the courts. In such a context the court acts unlawfully when it effectuates rather than avoids an arbitrary classification. 367 F.2d at 329-330.

See also, *Dunn* v. *United States*, 376 F.2d 191 (C.A. 4 1967); *United States* v. *Pratt*, 276 F. Supp. 80, 82 (D. N.J. 1967); *cf.*, *Shelley* v. *Kraemer*, 334 U.S. 1 (1948).

The *Stapf* viewpoint of unconstitutional discrimination was applied by the Fourth Circuit in *Cole* v. *North Carolina*, 419 F.2d 127 (C.A. 4, 1969). Originally, North Carolina had denied credit for jail time pending appeal. In 1969 the legislature amended the statutes so as to grant credit for such jail time, but the enactment operated prospectively only from its effective date. Cole had been convicted and appealed before that date. The Attorney General of North Carolina, "commendably", said the court, suggested that the case be remanded to the district court with directions to give the jail time credit. "The justification, the Attorney General states, is to avoid unlawful discrimination between the defendants tried subsequent to the enactment of the credit statutes and those tried prior to their enactment." *Id.* at 128. The court agreed and granted the relief the Attorney General had suggested.

The rule of *Cole* was applied in *Mott* v. *Dail*, 337 F. Supp. 731 (E.D. N.C. 1972). The question involved was whether the prisoner was entitled to credit on his sentence for time spent in custody prior to trial. North Carolina decisional law was to the effect that he was not entitled to such credit. In ordering that the credit be given, the Court said (at 732):

> The decision in this case is governed by the rationale in *Cole* v. *North Carolina*, 419 F.2d 127

(4th Cir. 1969). In that case Cole sought credit for time spent in custody *pending appeal*. Under the provisions of North Carolina General Statute § 15-186.1 a person tried after ratification of the statute is entitled to credit for time spent in custody pending appeal. Cole was tried prior to the enactment of the statute. However, the State of North Carolina conceded and the Fourth Circuit Court of Appeals held that when the statute was made prospective only an unlawful discrimination arose against persons tried prior to the ratification of the statute. The court ordered that credit be given.

The situation in the instant case is analogous to *Cole*. North Carolina General Statute § 15-176.2, ratified July 19, 1971, allows credit for time spent in custody *prior to trial*. The statute applies only to cases tried after the date of ratification. Petitioner was tried prior to enactment of the statute. Applying the reasoning underlying *Cole*, it is clear that petitioner is being subjected to an invidious discrimination and that he is entitled to credit for all time spent in custody prior to trial. See, *Withers* v. *North Carolina*, No. 71-1111 (4th Cir. Oct. 20, 1971).

If the repeal of 26 U.S.C. 7237(d) is to be construed so as to avoid the constitutional question of equal protection, then the reasoning of *Stapf*, *Cole*, and *Mott* is persuasive. An intent to practice unlawful discrimination cannot be attributed to Congress. As in the enactment and amendment of provisions for crediting jail time (18 U.S.C. 3568, discussed above), the repeal of §7237(d) cannot be regarded as a case where Congress "removed part of an evil" (that is, the denial of parole eligibility for persons committing offenses on or after May 1, 1971) "but disclaimed action on the rest" (that is, the evil of a denial of parole eligibility for

persons who had committed offenses before that date). *Stapf* v. *United States, supra*, p. 8.

Moreover, the legislative history of the 1970 drug act contains several references to a broad legislative intent in the repeal of § 7237(d). Referring to the recommendations made by the President's Advisory Commission on Narcotics and Drug Abuse (the Prettyman Commission), the House Committee said:

> The Commission recommends that the penalty provisions of the Federal narcotics and marihuana laws which now prescribe mandatory minimum sentences and prohibit probation or parole be amended to fit the gravity of the particular offense so as to provide a greater incentive for rehabilitation.
>
> Action. As discussed earlier in this report, . . . *elimination of the prohibition against probation and parole of narcotic offenders, is accomplished by this bill.* H.R. Rep. No. 91-1444, 91st Cong., 2d Sess. (1970); 3 U.S. Cong. & Admin. News (1970) 4584-4585. [Emphasis added.]

Similarly, the House Committee, responding to recommendations by the President's Commission on Law Enforcement and Administration of Justice, said:

> State and federal drug laws should give a large enough measure of discretion to the courts and correctional authorities to enable them to deal flexibly with violators. . . .
>
> Action. The penalty structure set forth in the reported bill provides a flexible system of penalties for Federal offenses, in accordance with . . . this recommendation. . . . H.R. Rep. No. 91-1444, *supra*, 3 U. S. Cong. & Admin. News (1970) 4587-4588; see also, The President's Commission on Law Enforcement and Administration of Justice,

> The Challenge of Crime in a Free Society, 141-143, 222-224 (1967); *Id.*, Task Force Report, Corrections, 86.

The key phrases in the above passages, "incentive for rehabilitation" and "discretion . . . to correctional authorities", show that Congress, in repealing § 7237(d), intended to map out the treatment for all federal narcotic offenders, past, present, and future. The whole purpose of the repeal of § 7237(d) was to provide "flexibility" and "discretion" in the rehabilitative phase of the criminal process, a purpose which has also been incorporated into both the Model Penal Code and the proposed new Federal Criminal Code. Model Penal Code § 1.01 and § 1.02 (1962); National Commission on Reform of Federal Criminal Laws, Final Report (1971), § 3401.

The Court of Appeals for the Ninth Circuit, in *United States* v. *Stephens*, 449 F.2d 103 (1971), has cogently summarized the purpose of the 1970 drug act, while applying it in a way that avoids problems of equal protection (at 106):

> The new Act reflects the current view that probation should be available for these [narcotic] offenses. Allowing it here permits a salutary tempering of the arbitrariness which otherwise would result from hewing to a cut-off date in transition from old to new law and an approach to evenhanded dispensation of justice not otherwise available. We fail to see how the public interest would be served by straining for a statutory construction that would achieve a contrary result.

The same reasoning applies to parole. The amici submit, in summary, that this Court should construe the repeal of § 7237(d) so as to preserve its constitu-

tionality and at the same time provide an "evenhanded dispensation of justice" to all federal prisoners convicted of narcotic offenses.

CONCLUSION

For the reasons herein stated, the amici submit that the Court should construe the repeal of 26 U.S.C. 7237(d) as a removal of the prior prohibition against parole as to all imprisoned narcotic offenders convicted of offenses which occurred before the repeal.

Respectfully submitted,

FRED M. VINSON, JR.
ROBERT S. ERDAHL
800 17th Street, N. W.
Washington, D. C. 20006

August 1972.

APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE
BUREAU OF PRISONS

FEDERAL REFORMATORY FOR WOMEN
ALDERSON, WEST VIRGINIA 24910

July 28, 1972

PROFESSOR WILLIAM RITZ
Washington & Leé University
Lexington, Virginia

Dear Professor Ritz:

We are submitting the following information per your request:

As of July 26, 1972, we have a total of 71 in the NARA program.

On June 30, 1972, of the 554 residents at Alderson, 127 of them had narcotic offenses, 38 were not eligible for parole, 89 were eligible to meet the Parole Board.

From July 1, 1972, through July 26, 1972, 14 new residents have been committed to the institution with narcotic offenses with sentences ranging from 1 year to 15 years.

The following people entered the institution with no parole and their status has now changed:

18059-170 Betsey, Wetahanna Jo
Sentenced March 25, 1970—North Oklahoma
5 years—no parole
Sentence changed June 1972
5 years—Eligible for parole

18060-170 Gordon, Flora
Sentenced March 12, 1970
5 years—no parole
Sentence changed May 17, 1972
5 years—Eligible for parole Oct. 28, 1971

18159-170 Francis, Elizabeth Ann
Sentenced June 5, 1970—N. Oklahoma
8 years—no parole
Sentence changed May 17, 1972
5 years—Eligible for parole Nov. 15, 1971
Met July 1972 Board

18566-170 Isaza, Maria Victoria
Sentenced April 23, 1971—E. New York
9 years—no parole
Sentence changed June 6, 1972
4 to 6 years—YCA 5010(b)
Met July 1972 Parole Board

18687-170 Isaza, Ruth Estela
Sentenced April 23, 1971—East New York
7½ years—no parole
Sentence changed June 6, 1972
4 to 6 years—YCA 5010(b)
Met July 1972 Parole Board

18651-170 Johnson, Mary Lee
Sentence June 23, 1971—E. Louisiana
5 years—no parole
Sentence changed—5 years 4208(a)(2)
Has made parole for October 1972

Residents Eligible for Parole

Sentenced before May 1971	—	26
Sentenced after May 1971	—	63
Total		89

Not Eligible for Parole

Sentenced before May 1971	—	32
Sentenced after May 1971	—	6
Total		38

We are attaching a list of residents with parole and a list of residents with no parole.

If you need additional information, please let us know.

Very truly yours,

VIRGINIA W. MCLAUGHLIN
Virginia W. McLaughlin
Warden

Enc.
cc: Mr. Fred M. Vinson, Jr.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1304

CHARLES B. BRADLEY, JR., BYRON H. JOHNSON, ROBERT T. ODELL, JR., AND WILLIAM JAMES HELLIESEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 455 F. 2d 1181.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1972 (App. 19). The petition for a writ of certiorari was filed on April 10, 1972, and

was granted on June 12, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 26 U.S.C. (1964 ed.) 7237(d) survives the enactment of the Comprehensive Drug Abuse Prevention and Control Act of 1970 so as to prohibit probation and parole for narcotics sellers who committed their offenses before the effective date of the new statute.

STATUTES INVOLVED

Section 4705(a) of the Internal Revenue Code of 1954, 68A Stat. 551, as amended, 26 U.S.C. (1964 ed.) 4705(a), provided:

> It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged or given, on a form to be issued in blank for that purpose by the Secretary or his delegate. [Repealed, effective May 1, 1971. § 1101(b)(3)(A), Pub. L. 91-513, 84 Stat. 1292; § 1105(a), Pub. L. 91-513, 84 Stat. 1292.]

Section 7237 of the Narcotic Control Act of 1956, 70 Stat. 568, as amended, 26 U.S.C. (1964 ed. and Supp. V) 7237, provided in pertinent part:

> (b) Whoever * * * conspires to commit an offense, described in section 4705(a) * * * shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. * * *
>
> * * * * * *

(d) Upon conviction—

(1) of any offense the penalty for which is provided in subsection (b) of this section * * * the imposition or execution of sentence shall not be suspended, probation shall not be granted and in the case of a violation of a law relating to narcotic drugs, section 4202 of Title 18, United States Code, and the Act of July 15, 1932 (47 Stat. 696; D. C. Code 24-201 and following), as amended, shall not apply. [Repealed, effective May 1, 1971, § 1101(b)(4)(A), Pub. L. 91-513, 84 Stat. 1292; § 1105(a), Pub. L. 91-513, 84 Stat. 1295.]

Section 1103(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1294, provides in pertinent part:

SEC. 1103.(a) Prosecutions for any violation of law occurring prior to the effective date of section 1101 shall not be affected by the repeals or amendments made by such section * * *, or abated by reason thereof.

Section 109 of the Act of July 30, 1947, 61 Stat. 635, 1 U.S.C. 109, provides in pertinent part:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability * * *.

STATEMENT

After a jury trial in the United States District Court for the District of Massachusetts, petitioners were convicted of conspiring, between March 4 and March 12, 1971, to sell cocaine in violation of 26 U.S.C. 4705(a). On June 2, 1971, after the May 1, 1971, effective date of the Comprehensive Drug Abuse Prevention and Control Act of 1970, each petitioner was sentenced to a five-year prison term, the mandatory minimum sentence prescribed by 26 U.S.C. 7237(b), which had been repealed by the Comprehensive Drug Abuse Act. The court of appeals affirmed their convictions. Thereafter, treating as an "appendage to their appeal" a motion to set aside sentence under Rule 35 of the Federal Rules of Criminal Procedure, it declined to remand the case for the district judge to consider granting probation. The court held that 26 U.S.C. 7237(d), which prohibited sentencing judges from suspending the sentences of narcotics offenders or placing them on probation, continued to apply to offenses committed before the effective date of the new Comprehensive Drug Abuse Act, even though petitioners were sentenced after its effective date.

SUMMARY OF ARGUMENT

The court below correctly determined that petitioners were ineligible for probation or parole, since the offenses for which they were convicted occurred before May 1, 1971. Section 7237(d) of the Narcotic Control Act of 1956 imposed an absolute ban on pro-

bation or parole for those convicted of selling or transferring certain narcotics. This absolute ban is modified by the Comprehensive Drug Abuse Prevention and Control Act of 1970, which became effective May 1, 1971. The new act provides, however, in Section 1103(a) that prosecutions for any violation of law occurring prior to May 1, 1971, shall not be affected by the repeal of the 1956 law.

Section 7237 and its legislative history demonstrate a clear congressional intent to establish a stringent system of penalties to discourage dealing in narcotics, including mandatory minimum sentences and the denial of the possibility of probation, suspension of sentence, or parole. Ineligibility for probation, suspended sentence, or parole was seen as a means of deterring the recruitment of "pushers," and, along with mandatory minimum sentences, was designed to make the penalty for violation of the law particularly severe.

The 1970 Comprehensive Drug Abuse Act adopted a more flexible approach to certain offenses committed after May 1, 1971, at least partly in recognition of difficulties in obtaining indictments and convictions under the previous law. The legislative history shows that Congress persisted in wanting to deal firmly with drug traffickers and that there was no intention to bestow leniency on persons who committed narcotics crimes prior to the effective date of the new law. This intent is clear not only from the language of the specific saving clause included as Section 1103 (a) and the legislative history of the 1970 Act, but

also from the difficulty that would result from the contrary approach. Since the new Act continues the ban on probation and parole for certain offenses (21 U.S.C. 848), an attempt to read Section 7237(d) as abated by the old Act presents two equally objectionable alternatives: Either the Parole Board must now assume the substantial and perhaps impossible burden of determining whether those convicted and sentenced under the old law would still be ineligible for parole under the standards set in the new law, or anomalously, all those sentenced under the old law are automatically eligible for parole under the new law, despite the congressional direction that certain offenders, even under the new law, are not eligible for parole. Neither of these alternatives was intended.

The conclusion that the bans on probation and parole in Section 7237(d) are preserved for offenses committed before May 1, 1971, is confirmed and implemented by the plain langauge of both the specific saving clause of the 1970 Act, Section 1103(a), and the general saving statute, 1 U.S.C. 109. Thus, automatic ban on probation and parole is saved as part of the "prosecution" of pre-repeal offenses referred to in Section 1103(a). It is also clear that the general saving statute applies to preserve the complete ineligibility for probation and parole for those charged under the 1956 Act. That statute states that the repeal of any statute shall not release any "penalty" incurred under such statute unless the repealing act expressly so provides. The repealing act here does not expressly so provide. The express stat-

utory denial of any possibility of probation or parole is part of the punishment for the offense, and thus saved by 1 U.S.C. 109 as a "penalty" that accrued at the time the offense was committed. Not only did Congress intend these denials to constitute part of the punishment for the crime, but they must naturally be perceived by the offender as part of his punishment.

ARGUMENT

An Offender Who Violates the Federal Narcotics Laws Prior to the Effective Date of the Comprehensive Drug Abuse Prevention and Control Act of 1970 Is Ineligible for Suspension of Sentence, Probation, or Parole Even If He Is Tried or Sentenced after the Effective Date of the New Act

At the time petitioners committed the narcotics offenses for which they were convicted, the statute defining the punishment for such offenses was 26 U.S.C. 7237. Subsection (b) of Section 7237 fixed a minimum term of imprisonment of five years, and subsection (d) provided that there could be no probation or parole for such offenses. The new Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 *et seq.*), which became effective on May 1, 1971, before petitioners were sentenced, repealed both 26 U.S.C. 4705(a) defining their offense, and 26 U.S.C. 7237 fixing its punishment. The new act retains prohibitions against probation, suspension of sentences, and parole for certain narcotics offenders engaged in "a continuing

criminal enterprise" (21 U.S.C. 848) [1] but otherwise allows suspension of sentence, probation, or parole. The new act provides, however, that prosecutions for any violation of law occurring prior to its effective date (May 1, 1971) "shall not be affected by the repeals or amendments" thereof. Public Law 91-513, Sec. 1103(a), 84 Stat. 1294.

The determination of the penalties for criminal offenses is essentially a matter of legislative policy, subject only to constitutional limitations. Thus in this case the controlling inquiry is the ascertainment of congressional choice. If that legislative judgment is sufficiently clear, it is conclusive, even if on one view of the underlying problem or another a different policy might seem wiser or more enlightened to some observers. *Gore* v. *United States*, 357 U.S. 386, 393; *Bell* v. *United States*, 349 U.S. 81, 82-83; cf. *Powell* v. *Texas*, 392 U.S. 514. Petitioners and the *amici curiae* concede that the sentence, including the Section 7237(b) five-year minimum sentence requirement, is part of the "prosecution", and thus is clearly meant to be preserved for their offense by

[1] The record does not indicate whether petitioners could have been prosecuted under 21 U.S.C. 848, if their offenses had been subject to the new law. Petitioners Bradley, Odell and Helliesen were also convicted of carrying firearms during the commission of a felony in violation of 18 U.S.C. (Supp. V) 924(c)(2). Each received a one-year suspended sentence and was placed on probation for three years, to commence after the expiration of his prison term. Thus, there is a possibility that, if probation were available, the district judge would consider placing them on probation.

the new act's saving clause, Section 1103(a).[2] The question at issue relates to the no-probation and no-parole provisions of Section 7237(d) for prior offenses. We shall show that the language of both the general saving statute, 1 U.S.C. 109, and the specific saving clause included by Congress in the new act, Section 1103(a), disclose and apply in clear terms the congressional decision that persons who engaged in narcotics sales prior to the effective date of the Comprehensive Drug Abuse Act are to be treated as if that act had never been passed. This means that they are subject to imprisonment for at least five years and also that they cannot be placed on probation and cannot be paroled. This is the import of the legislative history we shall discuss. The two

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[2] See Pet. Br. 14-15. See, also, *United States* v. *Fiotto*, 454 F. 2d 252 (C.A. 2), certiorari denied May 15, 1972, No. 71-1114; *United States* v. *Fithian*, 452 F. 2d 505 (C.A. 9). *United States* v. *McGarr*, No. 72-1108 (C.A. 7), decided April 28, 1972. This result is suggested by this Court's opinion in *Berman* v. *United States*, 302 U.S. 211, 212, where it was stated:

> Final judgment in a criminal case means sentence. The sentence is the judgment. *Miller* v. *Aderhold*, 288 U.S. 206, 210; *Hill* v. *Wampler*, 298 U.S. 460, 464. * * * To create finality it was necessary that petitioner's conviction should be followed by sentence * * *.

See, also, *Stack* v. *Boyle*, 342 U.S. 1, 12; *Pollard* v. *United States*, 352 U.S. 354, 360 n. 4; *Brady* v. *Maryland*, 373 U.S. 83, 85 n. 1; *Corey* v. *United States*, 375 U.S. 169, 174.

A number of persons convicted and sentenced under the old law are nevertheless contending in petitions for writs of certiorari which are pending before this Court that the mandatory minimum terms set by Section 7237(b) are not saved by Section 1103(a). The memorandum for the United States in *Navarro* v. *United States*, No. 72-5045, lists these petitions.

relevant statutes achieve this objective because the denial of probation and parole comes within the meaning of "prosecution" in Section 1103(a) and within the meaning of "penalty" in Section 109, notwithstanding the intervening repeal of those automatic prohibitions.

A. *Absolute Ineligibility for Probation or Parole under Section 7237(d) Was Part of the Punishment Established by Congress for Dealing in Narcotics*

Probation is generally regarded as part of the sentencing process, and is thus an integral part of the "prosecution" to be governed by prior law under the saving clause in the Comprehensive Drug Abuse Act. We shall also show that ineligibility for probation and parole is covered as part of the "prosecution" of the offense referred to in the 1970 Act's saving clause and as part of the "penalty" for the prior crime included in the general saving statute. But we turn first to an analysis of the initial legislative judgment to forbid probation or parole to narcotics offenders to explain why this provision embodies part of the punishment for the crime. As we shall see, this was understood by Congress when it passed the 1970 Act. And in repealing the absolute prohibitions of Section 7237(d) for future offenses, there was no intent to ameliorate the severity of any penalties already accrued or to abate liability for them.

1. *Section 7237(d) was part of the punishment for offenses under the Narcotics Control Act of 1956.*

Section 7237(d) was added to the Internal Revenue Code by the Narcotic Control Act of 1956, 70 Stat.

567. It was part of Chapter 75 of the Internal Revenue Code, Part II, which is entitled "Penalties Applicable to Certain Taxes". The heading of Section 7237 referred to "Violation of Laws" and dealt specifically with the various "penalties" to be imposed on narcotics offenders. Subsections (a) and (b) dealt with mandatory minimum and maximum prison penalties and (c) dealt in detail with the handling of repeat offenders. Subsection (d) provided:

> Upon conviction [of certain narcotics offenses]:
>
> * * * * *
>
> the imposition or execution of sentence shall not be suspended, probation shall not be granted, section 4202 of title 18 of the United States Code [authorizing release on parole] * * * shall not apply * * *.

Thus, we are not here dealing with probation or parole in the abstract; on the contrary, by the crisp terms of Section 7237, Congress manifested its determination to punish certain narcotics offenders by rendering them ineligible even to be considered for probation or parole after conviction.[8]

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[8] The way in which Section 7237(d) came into the law confirms the conclusion that it reflects another part of the punishment to be imposed as part of sentencing process. The original 1951 Boggs Act, 65 Stat. 767, effective November 2, 1951, 21 U.S.C. (1964 ed.) 174, contained mandatory penalty provisions, and prohibitions against suspension of sentence and probation for second or subsequent offenders. These same mandatory penalties and prohibitions were carried into Section 7237 (a) of the 1954 Internal Revenue Code. Ch. 75, Pub. L. 591, 68A Stat. 549, 860. The Narcotic Control Act of 1956 expanded Section 7237, turning the former Section 7237(a) into four

This analysis is confirmed by the legislative history of the Narcotics Control Act of 1956. That history shows a strong congressional intent to punish narcotic traffickers severely, in part by eliminating probation and parole as an element in the punishment prescribed for them. In order to determine the extent of the problem and to consider appropriate remedies, Congress held numerous hearings at which many experts testified. The Subcommittee on Narcotics of the House Committee on Ways and Means heard substantial evidence that, where probation was granted, narcotics trafficking increased. It heard testimony that 80 percent of the traffickers were first offenders who had prior records of crime outside of the narcotics area but were eligible to obtain suspended sentences and probation because they had no narcotics convictions. These were the people often being recruited in great number by multiple offenders. The Subcommittee concluded:

> With the possibility of receiving probation or a suspended sentence, these unscrupulous individuals are willing to risk apprehension for the fantastic profits derived from this type of crime. The markup in heroin sold to addicts in this country runs up to 10,000 percent over its cost at the source.

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separate paragraphs, increasing the mandatory penalties, applying the ban on probation and suspension of sentences to first offenders, and adding the ban on parole. The provisions prohibiting the suspension of sentence, probation and parole were placed in the new Section 7237(d) in order to avoid repetitiveness, since the prohibitions were being made applicable to new Section 176a and to 26 U.S.C. 4705(a) as well as to Section 174.

> Unless immediate action is taken to prohibit probation or suspension of sentence, it is the subcommittee's considered opinion that the first-offender peddler problem will become progressively worse and eventually lead to the large-scale recruiting of our youth by the upper echelon of traffickers. The penalties on peddlers with or without a record of prior convictions under our narcotics law must be made sufficiently severe to make the profits from this insidious commerce an inadequate inducement to assume the risks involved. [H. Rep. No. 2388, to accompany H.R. 11619, 84th Cong. 2d Sess. at 64.][4]

In its "Recommendations" to the entire Committee, the Subcommittee suggested that (*id.* at 69):

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[4] The recommendation of the Bureau of Narcotics was that the trafficker receive "a 5-year minimum, with no probation and no parole * * *." Hearings before a Subcommittee of the Committee on Ways and Means, House of Representatives, 84th Cong., October 13, 14, 18, 19, November 4, 7, 8, 10, 11, 14, 16, 17, December 14, 15, 1955, and January 30, 1956, p. 127.

Not all of the testimony was in favor of these prohibitions. The Deputy Attorney General, speaking for the Department of Justice, while recognizing that penalties are a matter for the legislature to determine, suggested that the courts should be allowed to retain their power to suspend sentences and place defendants on probation. See Statement by the Deputy Attorney General at Hearings before the Subcommittee on Improvements in the Federal Criminal Code of the Committee on the Judiciary of the United States Senate on S. 3760 (the Senate version of bill that passed) May 4, 1956, at 7, 8; see also, S. Rep. No. 1997, 84th Cong., 2d Sess. at 17, 18. Nevertheless Congress, although acknowledging "objections in principle to mandatory minimum penalties and prohibitions against suspended sentences" (S. Rep. No. 1997 to accompany S. 3760, 84th Cong., 2d Sess. at 23), decided they were justified.

* * * * *

> 2. The minimum and maximum penalties should be increased for all violations of the narcotic laws, both Federal and State, with parole eliminated.
>
> 3. Present penalties for traffickers in narcotics under the Boggs law would be increased to not less than 5 years for the first offense and not less than 10 years for second and subsequent offenses, with probation and suspension of sentences prohibited.

The Senate Report summarizes the legislative objective:

> [I]n order to define the gravity of this class of crime and the assured penalty to follow, these features of the law must be regarded as essential elements of the desired deterrents. * * *.[5]

Thus Section 7237(d) represented a clear and positive decision by Congress to make an absolute prohibition against suspension of sentence, probation, or parole an inherent part of the prosecution and punishment of the crime.[6]

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[5] S. Rep. No. 1997 to accompany S. 3760, 84th Cong., 2d Sess., at 6, quoting from the Report on the President's Interdepartmental Committee on Narcotics, February 1, 1956.

[6] See *Jones* v. *United States*, 419 F. 2d 593, 597 (C.A. 8), commenting on this section:

> "[T]he door is closed to *all* relief for the offender by way of suspension of sentence, probation, and parole. His sentence must be served. It is 'mandatory' in the true sense of the word."

2. *The 1970 Comprehensive Drug Abuse Act Was Not Intended to Ameliorate the Severity of Punishment for Prior Offenses.*

The new statute substantially revised the elements of the various narcotics offenses and the applicable penalty provisions. In contrast to the 1956 Act, which can fairly be described as basically punitive, the 1970 Act combines both the punitive and rehabilitative approaches. Its general philosophy is summarized in the House Report on the bill in these terms:

> 1) The illegal traffic in drugs should be attacked with the full power of the Federal Government. The price for participation in this traffic should be prohibitive. It should be made too dangerous to be attractive.
>
> 2) The individual abuser should be rehabilitated * * *.
>
> 3) Drug users who violate the law by small purchases or sales should be made to recognize what society demands of them. In these instances, penalties should be applied according to the principles of our present code of justice. When the penalties involve imprisonment, however, the rehabilitation of the individual, rather than retributive punishment, should be the major objective.[7]

Thus, for the "individual abuser", the emphasis now is on rehabilitation, and he is not even subject

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[7] H. Rep. No. 91-1444 (Part 1) to accompany H.R. 18583, 91st Cong., 2d Sess. at 9-10, quoting and adopting the Prettyman Commission report.

to a mandatory minimum prison term. However, under the old law, ineligibility for suspended sentence, probation, or parole only covered offenders involved in selling or otherwise transferring narcotics, and did not apply to mere possessors—"individual abusers". The new act is consistent with Section 7237(d) in retaining the punitive approach for the trafficker in illegal drugs. This is demonstrated by the fact that the ban on suspended sentences, probation and parole has been continued for persons who engage "in a continuing criminal enterprise" involving narcotics violations. 21 U.S.C. 848. Thus, a new distinction is introduced: in place of the denial of probation and parole to all those convicted of any sale or other transfer, the new law requires such denial for only some types of sellers. The penal object of this type of provision is clearly the same as when it had broader application under Section 7237(d).

But there is no indication that the flexibility introduced by the 1970 Act was intended to have any retroactive effect. Despite the premise of petitioners' argument, the action taken by Congress in repealing Section 7237(d) and allowing discretion as to probation and parole for some narcotics offenders was not primarily an expression of a desire for leniency. On the contrary, the legislative history shows that the dominant purpose of the new sentencing flexibility was not to benefit narcotics traffickers. The stated goal was more pragmatic: to increase the likelihood that drug pushers would be prosecuted and convicted. Thus, in explaining the bill's approach to penalties, the House Report stated:

> The foregoing sentencing procedures give maximum flexibility to judges, permitting them to tailor the period of imprisonment, as well as the fine, to the circumstances involved in the individual case.
>
> The severity of existing penalties, involving in many instances minimum mandatory sentences, have led in many instances to reluctance on the part of prosecutors to prosecute some violations, where the penalties seem to be out of line with the seriousness of the offense. In addition, severe penalties, which do not take into account individual circumstances, and which treat casual violators as severely as they treat hardened criminals, tend to make convictions somewhat more difficult to obtain. The committee feels, therefore, that making the penalty structure in the law more flexible can actually serve to have a more deterrent effect than existing penalties, through eliminating some of the difficulties prosecutors and courts have had in the past arising out of minimum mandatory sentences.[8]

As this approach suggests, there is nothing in the legislative history to indicate a congressional desire to open up prior violations to the possibilities permitted by the new law for subsequent violations. The key question in this regard is whether Congress wanted offenders ineligible for parole under Section 7237(d) to become eligible for parole as a result of the repeal of that section. The answer to that

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[8] H. Rep. No. 91-1444 (Part 1), p. 11. The Senate Report is to the same effect.

question must be in the negative. Extension of parole eligibility to such offenders would confer a "windfall" not intended by Congress. The new law introduces a procedure for trying and sentencing offenders who are to be ineligible for probation or parole. (21 U.S.C. 848.) But there is no mechanism for the Parole Board to determine which offenders sentenced under Section 7237(d) would be ineligible for parole if tried and convicted under the new section. Moreover, it would involve a substantial administrative burden if the Board of Parole had to make an inquiry into the facts of each pre-May 1971 narcotics sale to ascertain whether the offender would be eligible for parole under the standards set in the Comprehensive Drug Abuse Act. Nowhere does it appear that Congress contemplated imposing such a burden. Nor is it reasonable to impute to Congress a desire that all persons convicted of selling narcotics prior to May 1971 would now be eligible for parole. Since some offenders under the new act are still absolutely barred from parole, that anomalous result would stand congressional intent on its head.

The only conclusion that can be drawn is that Congress, by its silence on the subject, intended no change in the status of persons who engaged in narcotics sales before the effective date of the new act.[9]

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[9] The *amici curiae* brief filed on behalf of seven women prisoners argues that equal protection considerations require the construction of the new act to make the repeal of Section 7237(d) retroactive, and thus render all offenders convicted under the 1956 Act eligible for parole. It is the function of the legislature to determine the severity of the punishment to

It is against this background of congressional determination to use denial of probation and parole as punishment for certain narcotics violations, and it is in the light of this stern approach to narcotics sellers being taken by Congress even in the 1970 Act, that the Court must decide the application of the general saving statute and of the specific saving clause of the 1970 Act. To those inquiries we now turn.

B. *Both the Specific Saving Clause and the General Saving Statute Preserve the Application of Section 7237(d) to Offenses Committed Before May 1, 1971.*

The plain language of the saving statutes makes clear that the benefits of suspension of sentence, probation, and parole were not to become retroactively applicable to offenses for which they were forbidden at the time the offenses were committed.

The general saving statute, 1 U.S.C. 109, originally enacted in 1871, provides:

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be inflicted for similar offenses, and the fact that some offenses are punished with less severity than others is no denial of equal protection. See *Collins* v. *Johnston*, 237 U.S. 502, 510. Here Congress has decided that even under the new act certain narcotics violations should be subject to a ban on probation and parole. It is not unreasonable or invidious to determine that the new punishment distinctions should apply only in accordance with the newly created substantive distinctions. This Court has never held or intimated that equal protection requires Congress to give retroactive effect to new penalty provisions that are less severe than those in force at the time of violations. This Court's decisions on retroactivity indicate that classifications like this are reasonable. See *Linkletter* v. *Walker*, 381 U.S. 618, 629; *Johnson* v. *New Jersey*, 384 U.S. 719, 727.

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability * * *.[10]

Section 1103(a) of the 1970 Act specifically provides that:

> Prosecutions for any violation of law occurring prior to the effective date of section 1101 shall not be affected by the repeals or amendments made by such section * * *, or abated by reason thereof.

The natural thrust of these sections is to preserve the *status quo ante* for offenders who violated the law before it was altered. That is what the legislative history of the 1970 legislation persuasively suggests was understood and intended. An analysis of those sections, if necessary, confirms the conclusion that the probation and parole questions are controlled by the law as it stood when petitioners violated it.

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[10] At common law, when a criminal statute was replaced by another statute or was amended lessening punishment, the defendant was entitled to the benefit of the new Act, although his offense was committed prior to the effective date thereof, unless there was a general saving statute or a specific clause in the new act. *United States* v. *Reisinger*, 128 U.S. 398; *Moorehead* v. *Hunter*, 198 F. 2d 52 (C.A. 10).

1. *The Specific Saving Clause—Section 1103(a)*

The first question in this case—the availability of probation—can be disposed of quickly on the ground that a judge's decision on suspension of sentence and probation is generally accepted to be a part of the sentencing process. Thus the ban on probation for petitioners' offense is preserved as part of the "prosecution" of their crime as that term is used in the specific saving clause.

Petitioners do not deny that the sentence is part of the "prosecution" referred to in Section 1103(a). But the grant or denial of probation is part of the sentencing process, and petitioners' claim to eligibility for probation must therefore fail. In *Korematsu* v. *United States*, 319 U.S. 432, the defendant was placed on probation without being sentenced and no further court order was anticipated. The question before this Court was whether the conviction was reviewable on appeal, since neither imprisonment nor a fine had been imposed. In holding the conviction reviewable, the Court reasoned that probation is simply a milder form of punishment than incarceration. Hence, the order placing the defendant on probation was final, since it imposed a penalty, and terminated the prosecution on the merits.[11] In essence, the Court held that probation was the sentence. This is evident from the Court's statement that (319 U.S. at 435):

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[11] See *Phillips* v. *United States*, 212 F. 2d 327, 334 (C.A. 8): "Probation * * * is discipline under supervision, without incarceration * * *".

> The difference to the probationer between imposition of sentence followed by probation, as in the *Berman* case, and suspension of the imposition of sentence, as in the instant case, is one of trifling degree. * * * Here litigation "on the merits" of the charge against the defendant has not only ended in a determination of guilt, but it has been followed by the institution of the disciplinary measures which the court has determined to be necessary for the protection of the public.

The statute which grants to the courts the authority to suspend sentences and place defendants on probation (18 U.S.C. 3651) provides:

> Upon entering a judgment of conviction of any offense * * * any court * * * may suspend the imposition or execution of sentence and place the defendant upon probation * * *.

If probation is going to be granted, it is to be done at the time of sentencing, and the probationary power of the courts ceases once the defendant is imprisoned. *United States* v. *Murray*, 275 U.S. 347, 358; *Affronti* v. *United States*, 350 U.S. 79, 83; *Glouser* v. *United States*, 340 F. 2d 436 (C.A. 8), certiorari denied, 381 U.S. 940. The court in *United States* v. *Ellenbogen*, 390 F. 2d 537, 543 (C.A. 2), certiorari denied, 393 U.S. 918, stressed that:

> [T]he time of sentencing [is] the appropriate occasion for probation to be considered by the trial judge. This emphasis is consistent with both the underlying purpose of the Probation Act and the time when it was intended that the

district court should invoke its provisions. The clear purpose of the statute is to authorize a form of punishment without incarceration which may be utilized by a sentencing judge in a case where he believes the defendant will best be rehabilitated without undergoing actual imprisonment. * * *[12]

The Ninth Circuit in *United States* v. *Stephens*, 449 F. 2d 103, in holding that probation was available to a defendant sentenced after the effective date of the new act for an offense committed under the prior act, ignored the established meaning of the term "prosecution" used in Section 1103(a).[13]

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[12] Further support for the view that sentence is meant to encompass probation is provided by Rule 32 of the Federal Rules of Criminal Procedure. Rule 32(b) requires that a judgment of conviction set forth the defendant's sentence, in addition to the plea, the verdict and the adjudication. Rule 32(c) provides for the probation service to make a pre-sentence investigation and to include in the report any factors bearing on the imposition of sentence and the grant of probation. And Rule 32(e), providing that a defendant may be placed on probation after conviction of a non-capital crime, further shows that probation may be the sentence.

[13] In so doing, the court suggested that "[a]llowing * * * [p]robation permits a salutary tempering of the arbitrariness which otherwise would result from hewing to a cut-off date in transition from old to new law * * *." 449 F. 2d at 107. The answer to that suggestion is that any transition from old to new law involves the making of a cut-off that represents one choice among several options. The point at which that cut-off comes is a matter for legislative determination; in this case, Section 1103(a) indicates a clear congressional intent that the old law applies to "any violation of law occurring prior to the effective date" of the new act. The Ninth Circuit rule, as interpreted in *Noriega-Arjona* v. *Bureau of Prisons*, No. 72-1668 (C.A. 9, decided July 14, 1972), holds that defendants

The more significant issue in this case, in terms of long range impact, is whether the Section 7237 (d) ban on parole continues to apply to pre-May 1971 offenses. While the parole decision may not be part of the "prosecution" of a crime in the ordinary sense,[14] we have seen above that Congress viewed the

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sentenced before May 1, 1971, are ineligible for parole. This rule abandons the legislative choice of a cut-off date, the time of the commission of the offense, and substitutes instead one based entirely on the exigencies of trial. The court-selected date is surely no more compelling than the legislative directive that the law at the time of the commission of the offense is to govern the case at all stages. Moreover, the *Stephens* rule has led to inconsistent results in the Ninth Circuit district courts. Compare *Arjona, supra*, with *Batista* v. *United States*, No. 6301—Crim. (C.D. Cal., decided April 21, 1972) (modifying, on the basis of *Stephens*, a sentence imposed on October 29, 1970, to permit parole) and *United States* v. *Pregerson*, 448 F. 2d 404, 406 (C.A. 9), (remanding a suspended sentence imposed February 10, 1971, as beyond the court's power at that time, but explaining, "Initially, we leave to the district judge the question of whether he can now sentence under the legislation which became effective on May 1, 1971").

[14] The Court in *Morrissey* v. *Brewer*, No. 71-5103, decided on June 29, 1972, in approaching completely different issues, stated the general rule that parole is not part of the prosecution. The issue was whether the procedural rights that apply before and at a criminal trial apply also to parole revocation. We do not agree with the *amici curiae* brief filed on behalf of seven women prisoners that *Morrissey* requires that parole now be made available for pre-May 1, 1971, narcotics offenses. *Morrissey* only indicates that, for certain purposes, the decision to grant or deny parole by administrative authorities is not considered part of the "prosecution." But that decision does not even by implication argue against our position that a statutory provision precluding the possibility of parole for

absolute ineligibility for parole upon conviction for a narcotics offense as part of the punishment for the offense. Thus, we contend that the ineligibility for parole as directed by Section 7237(d) was part of the "prosecution" for the offenses covered by that section as Congress used the term in the specific saving clause in the 1970 Act. That was, we believe, the expectation of Congress. But it is not necessary to define the precise denotation of the word "prosecution"; the language of the general saving statute, which co-exists with the specific clause, provides clear statutory authority for enforcing the congressional decision to leave prior offenses unaffected, both as to the grant of probation and ineligibility for parole.

2. *The General Saving Statute—1 U.S.C. 109*

All the considerations discussed above which make the prohibitions of Section 7237(d) a part of the sentence show that it was intended to be a "penalty" or "liability" under 1 U.S.C. 109.[15] In *United States*

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a specific class of offenses is part of the punishment for those offenses, and thus part of their "prosecution" as that term is used in the specific saving clause of the 1970 Act.

[15] Beginning with *United States* v. *Reisinger*, 128 U.S. 398, the general saving clause has been held to apply to criminal laws and the punishments attached to them, and the effect has been to preserve the vitality of an amended or repealed law for purposes of both prosecuting and punishing offenses committed while the law was in effect. See *Lovely* v. *United States*, 175 F. 2d 312 (C.A. 4); *Hurwitz* v. *United States*, 53 F. 2d 552 (C.A. D.C.); *Duffel* v. *United States*, 221 F. 2d 528 (C.A. D.C.); *United States* v. *Kirby*, 176 F. 2d 101 (C.A. 2); *United*

v. *Reisinger*, *supra*, 128 U.S. at 402-403, this Court held that the term "liability" is synonomous with the term "punishment." "[T]hese words [penalty, forfeiture or liability] * * * were used by Congress to include all forms of punishment for crime * * *."

The Ninth Circuit's conclusion in the *Stephens* case (449 F. 2d at 106), that the grant of probation does not amount to the extinguishment of a penalty since it "does not wipe clean the defendant's penal obligation" misses the mark. The real question is whether the unavailability of probation and parole is a part of the penalty. The answer to that question is evident not only in terms of demonstrable congressional intent, as shown above, but also from the viewpoint of the convicted defendant. From that vantage point, his penalty is very substantially "released or extinguished" if he is placed on probation instead of being incarcerated. A convicted prisoner who has been paroled undoubtedly also believes that the parole constitutes a most substantial release of penalty. See *United States* v. *Ross*, No. 72-1135 (C.A. 2, decided June 13, 1972, sl. op. 3480). The converse is equally true: ineligibility for probation and parole by reason of the conviction itself is naturally regarded as an integral part of the "penalty" for the crime. The

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States v. *Brown*, 429 F. 2d 566 (C.A. 5); *Faubion* v. *United States*, 424 F. 2d 437 (C.A. 10); *Maceo* v. *United States*, 46 F. 2d 788 (C.A. 5); *United States* v. *Smith*, 433 F. 2d 341 (C.A. 4); *Stillman* v. *United States*, 177 F. 2d 607 (C.A. 9); *United States* v. *Carter*, 171 F. 2d 530 (C.A. 5); *United States* v. *Taylor*, 123 F. Supp. 920 (S.D. N.Y.), affirmed on opinion below, 227 F. 2d 958 (C.A. 2).

Sixth Circuit stated the correct view in *Harris* v. *United States*, 426 F. 2d 99, 100:

> It may be "legislative grace" for Congress to provide for parole but when it expressly removes all hope of parole * * * this is in the nature of an additional penalty * * *."

If the prohibition against probation and parole is a "penalty" (whether or not part of the "prosecution" for the purpose of the specific saving clause) it is saved by 1 U.S.C. 109. It has long been held that 1 U.S.C. 109 must be construed as part of subsequent repealing statutes, unless there is an express provision to the contrary in the repealing statute. *E. g.*, *United States* v. *Reisinger*, 128 U.S. 398, 402-403; *United States* v. *Carter*, 171 F. 2d 530, 532 (C.A. 5).

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[18] Indeed, a guilty plea taken without informing a defendant of his ineligibility for probation or parole is deemed by many courts to be invalid. *Munich* v. *United States*, 337 F. 2d 356, 361 (C.A. 9); *Berry* v. *United States*, 412 F. 2d 189, 193 (C.A. 8); *Jenkins* v. *United States*, 420 F. 2d 433, 437 (C.A. 10); *Harris* v. *United States*, 426 F. 2d 99 (C.A. 6); *Bye* v. *United States*, 435 F. 2d 177 (C.A. 2). See, contra, *Trujillo* v. *United States*, 377 F. 2d 266 (C.A. 5), certiorari denied, 389 U.S. 899, and *Smith* v. *United States*, 324 F. 2d 486 (C.A. D.C.), certiorari denied, 376 U.S. 957.

Amicus De Simone argues that Section 7237(d) affects only remedies and procedures, rather than substantive rights or penalties, and thus that it is not preserved by Section 109. For the reasons stated above, we believe it is clear that Section 7237(d) was intended by Congress to constitute part of the penalty. We believe De Simone's argument is without merit. The case upon which he relies, *Hollowell* v. *Commons*, 239 U.S. 506, is not in point; there, the Court held that the sole change in the statute was the change of the tribunal. Here, in contrast, Section 7237(d) imposes an additional penalty.

This is true even when the repealing act contains its own specific saving provision, as long as the repealing act does not provide otherwise. See *Duffel* v. *United States*, 221 F. 2d 523, 524 (C.A. D.C.); *United States* v. *Kirby*, 176 F. 2d 101, 104 (C.A. 2); *Lovely* v. *United States*, 175 F. 2d 312, 316 (C.A. 4). The repealing act in this instance does not attempt to bar the application of the general saving statute.

Petitioners contend that if the general statute were to control in this case the specific saving provision would be without purpose. This argument is unpersuasive. There are sound reasons for Congress to insert a specific saving clause in the repealing act, even though the general statute exists. The most obvious reason is to manifest congressional intent explicitly at the time of adoption, underscoring the inapplicability of the new measure to past violations.

Moreover, legislative redundancy is not uncommon. It is true that if there is a specific clause in the repealing act the courts generally look to that first, since it is the more recent enactment; but that does not mean that Section 109 does not apply. In *Great Northern Railway Co.* v. *United States*, 208 U.S. 452, 465, in discussing how the general saving statute (then Rev. Stat. 13) is to be treated when the repealing act has its own saving clause, the Court explained:

> As the section of the Revised Statutes in question has only the force of a statute, its provisions cannot justify a disregard of the will of Con-

gress as manifested either expressly or by necessary implication in a subsequent enactment. But while this is true the provisions of § 13 are to be treated as if incorporated in and as a part of subsequent enactments, and therefore under the general principles of construction requiring, if possible, that effect be given to all the parts of a law the section must be enforced unless either by express declaration or necessary implication, arising from the terms of the law, as a whole, it results that the legislative mind will be set at naught by giving effect to the provisions of § 13.[17]

Nor does *Hertz* v. *Woodman*, 218 U.S. 205, relied upon by petitioners, stand for the proposition that the saving clause contained in the repealing act controls to the exclusion of 1 U.S.C. 109. The Court in that case did not hold that the general and specific clauses were in conflict—it simply stated that if they had been in conflict, the specific would have prevailed.

The Ninth Circuit in *Stephens* took the position that Section 7237(d) was not the kind of statute to which Section 109 relates. To support this proposition, that Court relied on dicta in *Hamm* v. *City of Rock Hill*, 379 U.S. 306, where the defendant had been convicted under state trespass statutes for peacefully sitting-in at public lunch counters. The *Stephens*

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[17] In *United States* v. *Robinson*, 336 F. Supp. 1386 (W.D. Wis.), the court held that the defendant was not eligible for probation because "prosecutions" under § 1103(a) encompassed probation. The court continued:

> If there was any doubt concerning the meaning of the savings clause in the 1970 Comprehensive Drug Abuse

opinion quoted the statement in *Hamm* that Section 109 "was meant to obviate mere technical abatement." But the *Stephens* opinion itself points out that this Court has applied Section 109 to avoid "non-technical" abatements—those where there has been a substantive change in the law (*Stephens*, 449 F. 2d at 105, n. 6). At common law, the repeal of a statute or change in the definition or punishment of an offense created a "technical abatement" of any prosecution commenced thereunder. A "nontechnical" abatement resulted when the conduct involved was no longer a crime under the new law. In *Hamm*, the conduct was no longer a crime, but beyond that it had become affirmatively protected by statute, and thus transformed into a right. It is clear that the offense of selling cocaine without a written order form has undergone no such transmutation from prohibited crime to protected right as had the conduct in *Hamm*. In *Pipefitters Local Union No. 562* v. *United States*, No. 70-74, decided June 22, 1972, this Court similarly distinguished *Hamm* as applying only where a right is substituted for a crime. Although subsequent legislation there made lawful what had been a crime, the Court held that the general saving statute left the pre-repeal conduct fully punishable. And significantly, the Court reached that conclusion even after finding that there was no demonstration

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Prevention and Control Act, and the Court does not believe there is any doubt, the same result would follow—that defendant's motion must be overruled—because of the express provisions of 1 U.S.C. § 109. [*Id.* at 1387-1388.]

of specific congressional intent on this point when the new act was passed.

The application of the general saving statute to the present case is therefore much stronger. Under both old and new acts, petitioners' conduct remained criminal; the new act simply altered the specific elements of certain offenses and changed the penalties. And both the legislative history about the purposes of the legislation and the inclusion of a specific saving clause manifest congressional intent to let the pre-repeal law control pre-repeal violations.[18]

The court below (and the Second Circuit in *United States* v. *Ross*, *supra*, at 3481-3482) therefore cor-

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[18] The *Amicus* De Simone argues that, since Congress allowed parole for those already convicted when it passed the original parole statute in 1910 (Act of June 25, 1910, c. 387, § 1, 36 Stat. 819) and since it passed a law providing for the release on parole of persons confined under the no-parole marijuana sentences (Pub. L. 89-793, § 502, 80 Stat. 1449), the right to parole should be recognized in the instant case. But De Simone's argument carries its own refutation. In the instances he mentions it was the explicit judgment of Congress, not the strained judicial interpretation he seeks, that allowed those already convicted to become eligible for parole.

Compare *United States* v. *Taylor*, 123 F. Supp. 920 (S.D. N.Y.), affirmed, 227 F. 2d 958 (C.A. 2), where the defendant was convicted of violating the Boggs Act, 21 U.S.C. 174. At the time of the commission of the offense the maximum penalty was ten years' imprisonment, but prior to trial and imposition of sentence the maximum penalty was reduced to five years. The court held:

> Had Congress so intended it could readily have made available as to those guilty of offenses committed prior to the effective date of the Boggs Act the benefit of the reduced penalty. But the statute indicates no such purpose.

rectly rejected the *Stephens* approach and held that the general saving statute, 1 U.S.C. 109, does operate to preserve the prohibitions against probation and parole for offenders, like petitioners, who committed their crimes before the effective date of the Comprehensive Drug Abuse Act.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 1972.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 472-348 116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1304

JAMES B. BRADLEY, JR., BYRON H. JOHNSON, ROBERT T. ODELL, JR., and WILLIAM JAMES HELLIESEN,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR AMICI CURIAE

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Statement of Interest of Amici

The Amici Curiae herein, one of at least two groups of Amici who are, with the consent of the parties to the Writ, filing a brief with the Court, are two Federal prisoners serving sentences for narcotics violation convictions. Gerson Nagelberg is presently an inmate at the Federal Penitentiary at Lewisburg, Pennsylvania, and Vivienne Nagelberg, at the Massachusetts Correctional Institution for Women at Framingham, Massachusetts.

Both were convicted after trial in the United States District Court for the Southern District of New York, of violations of the former 21 U.S.C. §§ 173 and 174, and conspiracy so to do. Both were sentenced on June 18, 1970; thereafter, the convictions were affirmed by the Second Circuit Court of Appeals, 434 F. 2d 585 (1971), and certiorari was denied by this Court, 401 U.S. 939, 91 S. Ct. 935 (1971). Following the denial of certiorari, a timely Rule 35 motion was granted to the extent of reducing each sentence, and amended judgments, dated November 30, 1971, were entered.

In the amended judgment, the sentencing court specifically provided for parole at the discretion of the Board of Parole, pursuant to 18 U.S.C. § 4208 (a) (2), "if applicable".

Because of advice from the administrative authorities that (i) those authorities did not consider the Amici to be eligible for parole, and had so marked their prison files; (ii) that the necessary information and files for parole consideration had not been forwarded to the Board of Parole; and (iii) that the administrative action was final, the Amici commenced an action under 28 U.S.C. § 1361, in the nature of mandamus seeking to compel those authorities to comply with the amended judgment of the Court. *Vivienne Nagelberg and Gerson Nagelberg* v. *Richard G. Kleindienst, et al.*, S.D.N.Y., Docket No. 72 Civ. 4088. Issue was joined by service of defendants' answer dated November 27, 1972.

It is the position of the Amici herein that the savings clause contained in the repealing legislation, Comprehensive Drug Abuse, Prevention and Control Act of 1970, either conflicts with, or controls, by narrowing the scope of, the general savings clause, 1 U.S.C. § 109; that the term "prosecutions" which is used in the savings clause does not include the post-sentence concept of parole; that the provisions providing for a denial of parole are not

provisions providing for punishment but for the denial of privileges and thus are not such as would be saved; that notwithstanding the savings clause, there is nothing contained therein which provides that the Court must adhere to old law; that there are constitutional infirmities to the invocation of the savings clause to the applicability of parole privileges to some, but not other, similarly situated Federal prisoners; and that the Congressional purpose is frustrated by the continued denial of parole consideration to a degree that it becomes cruel and unusual punishment.

The Amici Curiae herein present another of the factual variations which the repeal of certain statutes has created. Those variations, all of which resolve themselves about the effective date of May 1, 1971, can be denoted as follows:

i) Commission prior—trial prior—sentence prior

ii) Commission prior—trial prior—sentence subsequent

iii) Commission prior—trial subsequent—sentence subsequent.

Actually, since if any date is determinative, it is that of entrance of judgment, they can be reduced conceptually to those whose final judgment is entered prior and those whose final judgment is entered subsequent. The Amici herein deem themselves to be in the latter group, as are the Petitioners herein, in view of the fact that the Amicis' convictions and sentence did not become final until the favorable determination of the motion for reduction under Rule 35, when the amended judgment was entered, November 30, 1971.

Summary of Points Argued

1. The no-parole provision of 26 U.S.C. § 7327 (d) being as it is, not a positive imposition of sentence (the positive mandates being contained within 26 U.S.C. § 7327 (a) and

21 U.S.C. §§ 173 and 174), and parole not being a substantive right, denial of parole consideration is but a non-judicial and remedial matter and not a substantive liability, and is not such that: i) it is saved by either savings clause (Pub. Law 91-513, § 1103, and 1 U.S.C. § 109); or ii) the integrity of the law or judicial process is offended by its non-saving.

2. Notwithstanding the savings clause, there is no absolute denial to the Courts of the power to provide for parole in a sentence otherwise conforming to the former law, if it sees fit, and a judgment and sentence entered after May 1, 1971, which avoids the "no-parole" provisions, should be deemed legal and proper.

3. If they are to be construed as within the constitutional standards of due process and equal protection, statutes such as the savings clause in the subject legislation, must expressly, or by implication, be deemed to contain the proviso of *Jones* v. *United States*, 327 F. 2d 867 (D.C. Cir., 1963).

4. Congressional intent would be frustrated by the application of either 1 U.S.C. § 109, or the savings clause of the Comprehensive Drug Abuse, Prevention and Control Act of 1970, to the case at bar, and the denial of parole, no longer serving a legislative purpose or function, is a violation of the Eighth Amendment's proscription of cruel and unusual punishment.

POINT I

The "no parole" provisions are not substantive liabilities saved by Pub. Law 91-513, § 1103 or 1 U.S.C. § 109.

The Petitioners were sentenced under 26 U.S.C. 7237 (b) for violations of 26 U.S.C. § 4705 (a). The Amici herein were sentenced under 21 U.S.C. §§ 173 and 174, for violation of those statutes.

The petitioners' sentencing statute, 26 U.S.C. § 7237 (b) contains a mandatory minimum sentence of five (5) years, as does the Amicis' herein, also five years. 21 U.S.C. § 173.

Both the sentences of the petitioners and of the Amici are affected by the terms of 26 U.S.C. § 7237 (d) which states that:

"(d) Upon conviction—

(1) of any offense the penalty for which is provided in subsection (b) of this section . . .

the imposition or execution of sentence shall not be suspended, probation shall not be granted and in the case of a violation of a law relating to narcotic drugs, section 4202 of title 18, United States Code, and the Act of July 15, 1932 (47 Stat. 696; D. C. Code 24-201 and following), as amended, shall not apply."

Effective May 1, 1971, both the substantive violation statute, 26 U.S.C. § 4705 and the sentencing statute, 26 U.S.C. § 7237 (and, in the case of the Amici, the all-inclusive 21 U.S.C. §§ 173 and 174) were repealed and in their place were substituted the provisions of the Comprehensive Drug Abuse, Prevention and Control Act of 1970, 21 U.S.C. §§ 801, *et seq.*

That legislation included a savings clause, Public Law 91-513, § 1103 (contained as a note to 21 U.S.C. § 171), which reads:

"(a) Prosecutions for any violation of law occurring prior to the effective date of section 1101, shall not be affected by the repeals or amendments made by such section or section 1102, or abated by reason thereof.

"(b) Civil seizures or forfeitures and injunctive proceedings commenced prior to the effective date of section 1101 shall not be affected by the repeals or amendments made by such section or section 1102, or

abated by reason thereof." [Pub. L. 91-513 Section 1103.]

The first question then, which was undertaken by the Petitioners, is what the savings clause was intended to save, and concurrently, the effect, if any, of this savings clause on the general savings clause now contained at 1 U.S.C. § 109, which reads:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

Parenthetically, respecting the applicability of 1 U.S.C. § 109, the Court must also consider whether the Comprehensive Drug Abuse, Prevention and Control Act of 1970 is not a *de facto* amendment of the previously disjointed provisions (which ranged through Titles 18, 19, 21, 26, 28, 31, 40, 42, 46 and 49). Just as amendatory legislation can be by implication and intent a *de facto* repeal, so too, where express intent and implied terms of repealing and repealed acts so indicate, they should be construed as, in fact, amendatory. *United States* v. *Tynen* (1871), 11 Wall. 88, 78 U.S. 88, 20 L. Ed. 153. If so, then giving the necessary effect to substance over form, and invoking the rule of strict construction with respect to criminal matters, 1 U.S.C. § 109 should be deemed not to apply since it specifically refers only to repeal situations.

To the extent that suspensions of sentence and probation are judicially imposed by, and subject to the surveillance, the Court, a distinction can be made as between those dispositions and parole, although the weight of authority ap-

pears to hold them as separate from sentence. See *United States ex rel. Voorhees* v. *Hill* (D. C. Penn., 1934), 6 F. Supp. 922 at 922, quoting 36 Op. Attys. Gen. 186:

> "The suspension of execution of sentence or grant of probation are acts separate and distinct from the judgment or sentence of the court and can not be regarded as being part of such judgment or sentence . . ."

Nonetheless, an arguable distinction can be made and is called to the Court's attention.

Parole, on the other hand, is an aspect of the "correctional process", is obtained through the administrative process and at the discretion of the Board of Parole, not of the Courts.

> "Parole arises after the end of the criminal prosecution, including imposition of sentence. Supervision is not directly by the court but by an administrative agency, which is sometimes an arm of the court and sometimes of the executive." [*Morrissey* v. *Brewer*, (1972) —— U.S. ——, 92 S. Ct. 2593 at 2600, —— L. Ed. 2d ——].

Hence, the allowance of parole consideration to narcotics offenders sentenced after the effective date of the new law, does not offend the judicial integrity which is sought to be protected by the savings clauses. Such persons in the position of the Petitioners and Amici are still convicted and sentenced under the former provisions.

The general savings clause (and by the application of the same reasoning, the specific savings clause) has been held to save only substantive rights and liabilities.

> ". . . the Supreme Court, in three cases interpreting former § 13, has held that it saves existing substantive rights and liabilities from repeal but does not

preserve 'remedies' or 'procedure' prescribed in the repealed statute. [*United States* v. *Obermeier* (2nd Cir., 1950) 186 F. 2d 243 at 253].

See *Great Northern Railway Co.* v. *United* (1907), 208 U.S. 452, 28 S. Ct. 313, 52 L. Ed. 567; *Herts* v. *Woodman* (1909), 218 U.S. 205, 30 S. Ct. 621, 54 L. Ed 1001; and, *Hallowell* v. *Commons* (1915), 239 U.S. 506, 36 S. Ct. 202, 60 L. Ed. 409.

The savings clause has also been held not to effect regulations or orders promulgated under a repealed statute. *United States* v. *Hark*, 49 F. Supp. 95 (D. Mass., 1943).

By application of the reasoning in *Obermeier, supra*, to the penal situation, the "unalterable substantive liability" [186 F. 2d at 254-255], at least as regards the Amici herein, is the act proscribed in former 21 U.S.C. §§ 173 and 174 and the penalty therein provided.

If it can be said of probation that:

> "Placing probationer upon probation did not affect the finality of the judgment. Probation is concerned with rehabilitation, not with determination of guilt." [*Berman* v. *United States* (1937), 302 U.S. 211 at 213, 58 S. Ct. 164, at 166].

Then it can be said even more forcefully of parole. Added to this, are the statements of this Court, that ". . . revocation of parole is not part of a criminal prosecution . . ." [*Morrissey* v. *Brewer, supra*, 92 S. Ct. at 2600]. Intrinsic in this statement is the corollary that parole granting is likewise not a part of a criminal prosecution. In fact, the Court in *Morrissey*, seemed to adopt the intermediate court's reasoning that, '. . . parole is only "a correctional device authorizing service of sentence outside the penitentiary" . . .' [92 S. Ct. at 2597]

It can be said in no uncertain terms that, notwithstanding the rights which might attach to parole or probationary status once granted, parole and probation are privileges and not substantive rights. It follows, then, that their denial is not a substantive liability which attaches to the criminal act and sentence so as to be likewise saved. (See *United States* v. *Obermeier, supra*, 186 F. 2d at 254-255).

Thus, the result urged upon the Court by the Petitioners and Amici herein offends the integrity of neither the former law, the new legislation, nor the judicial process.

POINT II

The savings clause in the Comprehensive Drug Abuse, Prevention and Control Act of 1970 does not constitute a bar to ultilization of parole provisions by the Court.

That the "no parole" provision is not part of the prosecution, conviction and sentence, is the argument made by the Petitioner. Likewise, it is argued above (at Point I) that as a non-substantive or administrative matter, the savings clause does not continue its existence.

An additional corollary suggests itself, in effect, that the Court is afforded the opportunity (constitutionally required as argued, see Point III) of invoking the parole provisions as it sees fit. Several recent Courts of Appeal have expressly or impliedly approved this alternative and the fact that parole is not a part of the prosecution, such that the latter is "affected" (see P. L. 91—513, § 1103 (a)), supports this approval.

Notwithstanding the acceptance by other Circuits of *United States* v. *Fiotto* (2nd Cir., 1972), 454 F. 2d 252, and cases like it, as indicative of a position opposite to that of the Ninth Circuit in *United States* v. *Stephens* (9th Cir., 1971), 449 F. 2d 103, and *United States* v. *Fifthian*

(9th Cir., 1971), 452 F. 2d 505, see for instance, *Page* v. *United States* (10th Cir., 1972), 459 F. 2d 467, we find a basis for suggesting otherwise.

Stephens, of course, was a situation where the defendant, after being sentenced under the provisions of the old law, was granted a suspension of sentence and probation. There is, thus, an additional question not touched upon by the Amici herein, to wit: can the same argument as made for parole, be made for judicial suspension of sentence?

However, respecting the parole aspect, it is not clear that the Second Circuit's opinion is the antithesis of the reasoning of *Stephens*, for that Court merely said, in *Fiotto*, that imposition of sentence under 26 U.S.C. § 7237 was correct. The same Circuit had said earlier, in *United States* v. *Wooden* (2nd Cir., 1971), 453 F. 2d 1258:

> "Of course, the district court is free to entertain motions from the parties to reconsider the sentence. Rule 35, F. R. Crim. P. If such a motion is made, that Court may then consider United States v. Stephens, 449 F. 2d 103 (9th Cir., 1971); United States v. Caraballo, 321 F. Supp. 843 (S.D.N.Y. July 19, 1971) aff'd without opinion (2nd Cir. Oct. 1, 1971), and United States v. Fiotto, Doc. 71-1641, currently pending in this Court, concerning the effect of the repeal of certain statutory provisions having to do with sentence." [*id.* at 1258]

Similarly, the language in *United States* v. *Carr* (7th Cir., 1972), 459 F. 2d 16 at 18-19, indicates that Court is of the same feeling.

While the overwhelming majority of cases certainly can be cited in opposition to the principle, it should be pointed out that in those cases, as in the case at bar, the question has been presented in a manner lending itself to the interpretation which the Respondent herein urges. It

presents the issue in the context of the question: "Is a sentence under the former statutory provisions susceptible to attack under a Rule 35 motion or on direct appeal as an illegal sentence?" In other words, can a defendant *demand* parole? However, under this argument, we pose to the Court the additional issue as to whether a sentence under the old provisions but allowing for parole, is also legal.

POINT III

To conform to the constitutional standards of equal protection the savings clause of the new law must be deemed to provide a basis for distinction between defendants other than the effective date of the new legislation.

Morrissey v. *Brewer, supra,* clearly determined, as have other cases, see *Mempha* v. *Rhay* (1967), 389 U.S. 128; *Ernest* v. *Willingham* (10th Cir., 1969), 406 F. 2d 681; *United States* v. *Hines* (10th Cir., 1969), 419 F. 2d 173; *Brown* v. *Kearney* (5th Cir., 1966), 355 F. 2d 173; and *Martin* v. *United States* (4th Cir., 1950), 183 F. 2d 436, that parolees and probationers have certain basic, constitutional rights and that such procedural safeguards attach to the revocation process, as the particular constitutional right demands. It would be illogical and unreasonable to assume that the constitution does not similarly govern the benefaction process to the extent that, at the very least, equal protection under the Fifth and Fourteenth Amendments must be afforded.

That an otherwise valid statute could not avoid constitutional infirmities is *ipse dixit.* Legislation cannot vitalize an otherwise constitutionally debilitated concept. The distinction or classification between similarly situated persons in the application of privileges and rights, cannot be arbitrary, as in this case. As this Court stated in *Baxstrom* v.

Herold (1966), 383 U.S. 107 at 111; 86 C. Ct. 760, 15 L. Ed. 2d 620:

> "Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made. Walters v. City of St. Louis, 347 U.S. 321, 237, 74 S. Ct. 505, 509, 98 L. Ed. 660."

This principle applies to persons in the position of the Petitioners and the Amici herein.

Another way of expressing the same thought, is that the application of "no parole" provisions to a sentence subsequent to May 1, 1971, becomes the imposition of an unconstitutional condition to a sentence, a principle recently repudiated in *Frazier* v. *Jordan* (5th Cir., 1972), 457 F. 2d 726, which was based, in turn, upon this Court's decisions in *Williams* v. *Illinois* (1970), 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586; *Morris* v. *Schoonfield* (1970), 399 U.S. 508, 90 S. Ct. 2232, 26 L. Ed. 2d 773; and *Tate* v. *Short* (1971), 401 U.S. 395, 91 S. Ct. 668, 28 L. Ed. 2d 130.

If there is to be any effective saving of the "no parole" provision it must therefore be on a basis more rational and less arbitrary than that of a mere date on a calendar. In effect, with the passage of the Comprehensive Act of 1970, the legislature created a special class of cases, to wit: those defendants who are convicted under prior law but sentenced after the effective date.

In the past, statutes revising penalties have contained a proviso which avoids the constitutional difficulty posed herein. Such a case is *Jones* v. *United States* (D. C. Cir., 1963), 327 F. 2d 867, which was an instance where no new crime was created but where the legislation dealt with a revision of punishment (in that case, the punishment for murder). The legislation included the provision:

> "Cases tried prior to the effective date of this Act and which are before the court for the purpose of sentence

or resentence *shall be governed by the provisions of law in effect prior to the effective date of this Act: Provided,* That the judge may, in his sole discretion, consider circumstances in mitigation and in aggravation and make a determination as to whether the case in his opinion justifies a sentence of life imprisonment, in which event he shall sentence the defendant to life imprisonment. Such a sentence of life imprisonment shall be in accordance with the provisions of this Act. (Emphasis in the original.)" [*id.*, at page 870]

So, too, here, the legislation, if it is not to be construed unconstitutionally, must be implied to contain such a provision authorizing judicial discretion, and not in a way as to demand the absolute and discriminatory applications of the old provisions.

The opinions rendered by this Court in *Furman* v. *Georgia*, No. 69-5003, —— U.S. ——, 92 S. Ct. 2726 —— L. Ed. 2nd —— (1972) and its companion cases, lend themselves to this view. Though dealing in the main with the question of whether the death penalty is unconstitutional, the Court also recognized that the issue there is derived from the "basic theme of equal protection" [92 S. Ct. at 2732, opinion of Douglas, J.].

This case represents a situation which, if the Respondent's position is accepted, is violative of the Equal Protection Clause by its terms, or, if viewed only from the point of decisional law, is arbitrary in its application. Its application has none of the attributes of "informed selectivity" [92 S. Ct. at 2754] which might save it, unless this Court requires them to be read into the terms of the savings clause by necessary implication.

POINT IV

The construction urged by the respondent frustrates Congressional intent and renders the denial of parole a cruel and unusual punishment.

(a) 1 U.S.C. § 109

The principle embodied, perhaps impliedly more than expressly, in *Hamm* v. *City of Rock Hill*, and the historical basis for the general savings statute, is that an evidenced intent to change the penalty should not, by technical rule, abate, too, the substantive crime, a result not intended. That case, aside from ascribing a place for 1 U.S.C. § 109 as a final bulwark against unintended results, points up the importance of congressional intent to any interpretation, that the spirit of the legislation can, and indeed, should, overcome the word. Just as an unwanted result should not irrevocably attach to an intended change, an intended change should not by hypertechnical application, decree an unwanted result.

Behind the statute was the common law rule that with the repeal of an act without any reservation of its penalties, all criminal proceedings taken under it fell as to those persons on whom sentence had not yet been imposed. See *Yeaton* v. *United States* (1809), 5 Cranch 281; *United States* v. *Reisinger* (1888), 128 U.S. 398, 9 S. Ct. 99. "The basis for the rule was a presumption that the repeal was intended as a legislative pardon for past acts." *United States* v. *Hark* (D.C. Mass. 1943), 49 F. Supp. 15 at 97. Thus, 1 U.S.C. § 109 was passed to avoid the inadvertent and absolute application of the rule, and necessarily the presumption, where the underlying intent was absent.

The distinction between a technical abatement and non-technical abatement was clearly made by *United States* v. *Stephens* (9th Cir., 1971), 449 F. 2d 103, at page 105, note 6. The general savings clause serves as a stopgap to inadvertency. But just as avoidance of the inadvertent application of the common law rule was sought, so should the

inadvertent application of the statute where congressional intent is manifests opposition to such application. Therefore, by intent, § 109 should not apply; by reason, it should not *be* applied.

(b) Pub. L. 91-513, 84 Stat. 1236 (nt. to 21 U.S.C. § *171*)

As to the purpose and intent of the Comprehensive Drug Abuse and Prevention Act of 1970, the Congressional reports make this clear:

> "If the abuser is to be penalized, he should not be penalized in the spirit of retribution. The modern concept of criminology should apply—that penalties fit offenders as well as offenses. . . . When the penalties involve imprisonment, however, rehabilitation of the individual, rather that retributive punishment, should be the major objective." [House Report No. 91-1444, U. S. Code, Congressional and Administrative News, 1970, Vol. 3, page 4575]

Indeed, in that same report, under the caption, "Principal Purpose of the Bill", was written, "This legislation is designed to deal in a comprehensive fashion with the growing menace of drug abuse in the United States. . . (3) by providing for an overall balanced scheme of criminal penalties for offenses involving drugs." [*id.*, at page 4567]. But the effect given it by most of the cases of persons in the positions of the Petitioners and the Amici, is precisely the opposite in this regard as among persons guilty of similar acts. It has become a situation even more disparate and retributive by virtue of the judicial non-recognition or misapplication of this new legislation.

To quote further from the indicators of Congressional intent:

> "The severity of existing penalties, involving in many instances minimum mandatory sentences, have led in many instances to reluctance on the part of prosecutors to prosecute some violations, where the penalties seem to be out of line with the seriousness of the of-

fense. In addition, severe penalties, which do not take into account individual circumstances, and which treat casual violators as severely as they treat hardened criminals, tend to make convictions somewhat more difficult to obtain. The committee feels, therefore, that making the penalty structure in the law more flexible can actually serve to have a more deterrent effect than existing penalties, through eliminating some of the difficulties prosecutors and courts have had in the past arising out of minimum mandatory sentences." [*Id.*, at 4576]

And, discussing the bill in terms of the Prettyman Commission and Katzenbach Commission Recommendations, it was stated, respectively:

"12. The Commission recommends that the penalty provisions of the Federal Narcotics and marijuana laws which now prescribe mandatory minimum sentences and prohibit probation and parole be amended to fit the gravity of the particular offense so as to provide a greater incentive for rehabilitation.

Action. As discussed earlier in this report, elimination of almost all mandatory sentences, as well as elimination of the prohibition against probation and parole of narcotic offenders, is accomplished by this bill." [*Id*, at p. 4585]

"(3) Recommendation. State and Federal drug laws should give a large enough measure of discretion to the courts and correctional authorities to enable them to deal flexibly with violators, taking account of the nature and seriousness of the offense, the prior record of the offender and other relevant circumstances.

Action. The penalty structure set forth in the reported bill provides a flexible system of penalties for Federal offenses, in accordance with both this recommendation and recommendation No. 12 of the Pretty-

man Commission. The recommended Model State law also contains similar provisions." [*Id.*, at p. 4587-4588]

It is clear that Congress has the power to create the effect we argue here, that is, to abate the application of the parole denial statute *vis-a-vis* pending convictions which are still susceptible of direct action or relief. As stated in *Hamm* v. *City of Rock Hill, supra*, 379 U.S. at 316:

> "In our view Congress clearly had the power to extend immunity to pending prosecutions . . . We have found Congress has ample power to extend the statute to pending convictions . . ."

The congressional intent and purpose expressed in the above-quoted reports certainly evidences such an extension of immunity. But even absent such expressions of intent, the abatement of the 'no parole" provisions should be read into the new legislation. Again, as stated by this Court in the *Hamm* case, cited earlier:

> "It is apparent that the rule exemplified by Chambers* does not depend on the imputation of a specific intention to Congress in any particular statute. None of the cases cited drew on any reference to the problem in the legislative history or the language of the statute. Rather the principle takes the more general form of imputing to Congress an intention to avoid inflicting punishment at a time when it can no longer further any legislative purpose and would be unnecessarily vindictive. This general principle, expressed

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*A rule of abatement which in *United States* v. *Chambers* (1933), 29 U.S. 217, the Court appeared to base on the specific legal precept that Congress could not give effect to that to which the Constitution had denied vitality. The Supreme Court, here in *Hamm*, seemed to raise that specific precept above that level to one of general principle.

in the rule, is to be read wherever applicable as part of the background against which Congress acts." [379 U.S. at 313]

Certainly, Congress had no intention to remove criminal sanction from the particular illegal acts, and for this reason, the savings clause had to be included. But the Congress did intend to adjust the methods by which the particular sanctions are applied and the savings clause must not be construed to frustrate in part or in whole this Congressional purpose. Congress, in passing the savings clause, was interested, in sustaining, not parole denial, but rather the criminal liability for such acts as covered by the repealed statutes.

It follows from this argument, that the application of "no parole" provisions becomes excessive and no longer serves a valid legislative purpose. Thus, this argument may be extended to the constitutional level that imposition of the "no parole" provisions is violative of the Eighth Amendment's proscription of cruel and unusual punishment. See *Furman* v. *Georgia*, No. 69-5003, 92 S. Ct. 2726 (1972), the opinions of Douglas, J. and Brennan, J.

CONCLUSION

For the reasons herein stated the amici request that the Court construe the repeal of 26 U.S.C. § 7237 (d) as a removal of the bar to parole to imprisoned narcotics offenders sentenced after May 1, 1971, under the old law.

Respectfully submitted,

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Dated: New York, N. Y., January 2, 1973.

OPINION

SUPREME COURT OF THE UNITED STATES

Syllabus

BRADLEY ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 71–1304. Argued January 8, 1973—Decided March 5, 1973

On May 6, 1971, petitioners were convicted and sentenced for narcotics offenses committed in March 1971. They received the minimum five-year sentences under a provision that was mandatory and made the sentences not subject to suspension, probation, or parole. Effective May 1, 1971, that provision was repealed and liberalised by the Comprehensive Drug Abuse Prevention and Control Act of 1970. On petitioners' motion for vacation of their sentences and remand for resentencing, the Court of Appeals held that the new provisions were unavailable in view of the Act's saving clause, which made them inapplicable to "prosecutions" antedating the Act's effective date. *Held:*

1. The word "prosecutions" in the saving clause is to be accorded its normal legal sense, under which sentencing is a part of the concept of prosecution. Therefore, the saving clause barred the District Judge from suspending sentence or placing petitioners on probation. Pp. 2–5.

2. Under the saving clause, parole under 18 U. S. C. § 4208 (a) is likewise unavailable to petitioners, since by its terms that provision is inapplicable to offenses for which a mandatory penalty is provided; and, in any event, a decision to grant early parole under that provision must be made "[u]pon entering a judgment of conviction," which occurs before the end of the prosecution. Pp. 5–6.

455 F. 2d 1181, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined, and in Part I of which BRENNAN and WHITE, JJ., joined. BRENNAN and WHITE, JJ., filed a statement concurring in the judgment. DOUGLAS, J., filed a dissenting opinion.

SUPREME COURT OF THE UNITED STATES

No. 71-1304

Charles B. Bradley, Jr., et al., Petitioners, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[March 5, 1973]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

In this case we must decide whether a District Judge may impose a sentence of less than five years, suspend the sentence, place the offender on probation, or specify that he be eligible for parole, where the offender was convicted of a federal narcotics offense that was committed before May 1, 1971, but where he was sentenced after that date. Petitioners were convicted of conspiring to violate 26 U. S. C. § 4705 (a) (1964 ed.) by selling cocaine not in pursuance of a written order form, in violation of 26 U. S. C. § 7237 (b) (1964 ed. and Supp. V). The conspiracy occurred in March 1971. At that time, persons convicted of such violations were subject to a mandatory minimum sentence of five years. The sentence could not be suspended, nor could probation be granted, and parole pursuant to 18 U. S. C. § 4202 was unavailable. 26 U. S. C. § 7237 (d) (1964 ed. and Supp. V). These provisions were repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1236, 21 U. S. C. § 801 *et seq.* The effective date of that Act was May 1, 1971, five days before petitioners were convicted.

Each petitioner was sentenced to a five-year term.[1] On appeal to the Court of Appeals for the First Circuit, various points, not here relevant, were raised. Following affirmance of their convictions, petitioners moved that their sentences be vacated and their cases be remanded to the District Court for resentencing pursuant to Rule 35, Fed. Rule Crim. Proc. In their motion they contended that the District Court should have considered "certain sentencing alternatives, including probation, suspension of sentencing and parole" which became available on May 1, 1971. The Court of Appeals considered this motion as an "appendage" to the appeal. It held that the specific saving clause of the 1970 Act, § 1103 (a), read against the background of the general saving provision, 1 U. S. C. § 109, required that "narcotics offenses committed prior to May 1, 1971, are to be punished according to the law in force at the time of the offense," and that "under the mandate of § 109 the repealed statute, § 7237 (d) is 'to be treated as still remaining in force.'" 455 F. 2d 1181, 1190, 1191. Accordingly, the Court of Appeals held that the trial judge lacked power to impose a lesser sentence.

We granted the petition for writ of certiorari, 407 U. S. 908 (1972), in order to resolve the conflict between the First and Ninth Circuits, see *United States* v. *Stephens*, 449 F. 2d 103 (CA9 1971).[2]

I

At common law, the repeal of a criminal statute abated all prosecutions which had not reached final disposition

[1] Petitioners Bradley, Helliesen, and Odell were found guilty also of unlawfully carrying a firearm during the commission of a felony, in violation of 18 U. S. C. § 924 (c)(2). Each was sentenced to one year in prison; the sentences were suspended, and each was placed on probation for three years on these counts.

[2] See also *United States* v. *McGarr*, 461 F. 2d 1 (CA7 1972); *United States* v. *Fiotto*, 454 F. 2d 252 (CA2 1971).

in the highest court authorized to review them. See *Bell* v. *Maryland*, 378 U. S. 226, 230 (1964); *Norris* v. *Crocker*, 13 How. 429 (1851). Abatement by repeal included a statute's repeal and re-enactment with different penalties. See 1 J. Sutherland, Statutes and Statutory Construction § 2031 n. 2 (3d ed. 1943). And the rule applied even when the penalty was reduced. See, *e. g.*, *The King* v. *M'Kenzie*, 168 Eng. Rep. 881 (K. B. 1820); *Beard* v. *State*, 74 Md. 130, 21 A. 700 (1891). To avoid such results, legislatures frequently indicated an intention not to abate pending prosecutions by including in the repealing statute a specific clause stating that prosecutions of offenses under the repealed statute were not to be abated. See generally Note, Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation, 121 U. Pa. L. Rev. 120, 121–130 (1972).

Section 1103 (a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 is such a saving clause. It provides:

> "Prosecutions for any violation of law occurring prior to the effective date of [the Act] shall not be affected by the repeals or amendments made by [it] . . . or abated by reason thereof."

Petitioners contend that the word "prosecution" in § 1103 (a) must be given its everyday meaning. When people speak of prosecutions, they usually mean a proceeding that is underway in which guilt is to be determined. In ordinary usage, sentencing is not part of the prosecution, but occurs after the prosecution has concluded. In providing that "prosecutions . . . shall not be affected," § 1103 (a) means only that a defendant may be found guilty of an offense which occurred before May 1, 1971. The repeal of the statute creating the offense does not, on this narrow interpretation of § 1103

(a), prevent a finding of guilt. But § 1103 (a) does nothing more, according to petitioners.

Although petitioners' argument has some force, we believe that their position is not consistent with Congress' intent. Rather than using terms in their everyday sense, "the law uses familiar legal expressions in their familiar legal sense." *Henry* v. *United States*, 251 U. S. 393, 395 (1920). The term "prosecution" clearly imports a beginning and an end. Cf. *Kirby* v. *Illinois*, 406 U. S. 682 (1972); *Mempa* v. *Rhay*, 389 U. S. 128 (1967). In *Berman* v. *United States*, 302 U. S. 211 (1937), this Court said, "Final judgment in a criminal case means sentence. The sentence is the judgment. *Miller* v. *Aderhold*, 288 U. S. 206, 210; *Hill* v. *Wampler*, 298 U. S. 460, 464." *Id.*, at 212. In the legal sense, a prosecution terminates only when sentence is imposed. See also *Korematsu* v. *United States*, 319 U. S. 432 (1943); *United States* v. *Murray*, 275 U. S. 347 (1928); *Affronti* v. *United States*, 350 U. S. 79 (1955).[3] So long as sentence has not been imposed, then, § 1103 (a) is to leave the prosecution unaffected.[4]

We therefore conclude that the Court of Appeals properly rejected petitioners' motion to vacate sentence and remand for resentencing. The District Judge had

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[3] These cases involve determining whether a judgment in a criminal case is final for the purpose of appeal and determining whether the function of the trial judge has been concluded so that he may not alter the sentence previously imposed to include probation. The precise issues are, of course, different from the issue in this case. But these cases do show the point at which a prosecution terminates, and that is the issue here.

[4] Petitioners also argue that imposition of sentence precedes the suspension of sentence and the grant of probation. But the actions of the District Judge in imposing sentence and then ordering that it be suspended are usually so close in time that it would be unrealistic to hold that Congress intended so to fragment what is essentially a single proceeding.

no power to consider suspending petitioners' sentences or placing them on probation. Those decisions must ordinarily be made before the prosecution terminates, and § 1103 (a) preserves the limitations of § 7237 (d) on decisions made at that time.

II

The courts of appeals that have dealt with this problem have failed, however, to consider fully the special problem of the parole eligibility of offenders convicted before May 1, 1971. The Seventh and Ninth Circuits hold that such offenders are eligible for parole.[8] The First Circuit in this case stated that petitioners were "ineligible for suspended sentences, *parole*, or probation." 455 F. 2d 1181, 1191 (emphasis added).

In the federal system, offenders may be made eligible for parole in two ways. Any federal prisoner "whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving one-third of" his sentence. 18 U. S. C. § 4202. Alternatively, the District Judge, "[u]pon entering a judgment of conviction, . . . may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than, but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the

[8] See n. 2, *supra*. We were informed at oral argument that "the Board of Parole is now considering as eligible for parole only defendants who have been sentenced in the Seventh and Ninth Circuits for narcotics offenses." Tr. of Oral Arg., at 23. Our disposition of this case has no bearing on the power of the Board of Parole to consider parole eligibility for petitioners under 18 U. S. C. § 4202. See *infra*, —.

prisoner may become eligible for parole at such time as the board of parole may determine." 18 U. S. C. § 4208 (a).

Section 1103 (a) clearly makes parole unavailable under the latter provision. As we have said, sentencing is part of the prosecution. The mandatory minimum sentence of five years must therefore be imposed on offenders who violated the law before May 1, 1971. And Congress specifically provided that § 4208 (a) does not apply to any offense "for which there is provided a mandatory penalty." Pub. L. 85-752, § 7, 72 Stat. 847 (1958). In any event, the decision to make early parole available under § 4208 (a) must be made "[u]pon entering a judgment of conviction," which occurs before the prosecution has ended. Section 1103 (a) thus means that the District Judge cannot specify at the time of sentencing that the offender may be eligible for early parole.

That was the only question before the Court of Appeals, and it is therefore the only question before us. Petitioners' motion, on which the Court of Appeals ruled, requested a remand so that the District Judge could consider the sentencing alternatives available to him under the Comprehensive Drug Abuse Prevention and Control Act of 1970. That Act, however, did not expand the choices open to the District Judge in this case, and the Court of Appeals correctly denied the motion to remand. The availability of parole under the general parole statute, 18 U. S. C. § 4202, is a rather different matter,* on which we express no opinion.

Affirmed.

*The decision to grant parole under § 4202 lies with the Board of Parole, not with the District Judge, and must be made long after sentence has been entered and the prosecution terminated. Whether § 1103 (a) or the general savings statute, 1 U. S. C. § 109, limits that decision is a question we cannot consider in this case.

MR. JUSTICE BRENNAN and MR. JUSTICE WHITE join Part I of the Court's opinion and would affirm for the reasons there expressed. They are also of the view that § 1103 (a) forecloses the availability of parole under both 18 U. S. C. § 4202 and 18 U. S. C. § 4208 (a), and that even if this were debatable as to § 4202, that the general savings statute, 1 U. S. C. § 109 clearly mandates that conclusion as to that section. They therefore do not join Part II of the Court's opinion.

SUPREME COURT OF THE UNITED STATES

No. 71-1304

James B. Bradley, Jr., et al., Petitioners, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[March 5, 1973]

MR. JUSTICE DOUGLAS, dissenting.

The correct interpretation of the word "prosecutions" as used in § 1103 (a) of the 1970 Act was, in my view, the one given by the Court of Appeals of the Ninth Circuit in *United States* v. *Stephens*, 449 F. 2d 103, 105:

> "Prosecution ends with judgment. The purpose of the section has been served when judgment under the old Act has been entered and abatement of proceedings has been avoided. At that point litigation has ended and appeal is available. *Korematsu* v. *United States*, 319 U. S. 432, 63 S. Ct. 1124, 87 L. Ed. 1497 (1943). What occurs thereafter—the manner in which judgment is carried out, executed or satisfied, and whether or not it is suspended—in no way affects the prosecution of the case."

The problem of ambiguities in statutory language is not peculiar to legislation dealing with criminal matters. And the question as to how those ambiguities should be resolved is not often rationalized. The most dramatic illustration at least in modern times is illustrated by *Rosenberg* v. *United States*, 346 U. S. 273, where a divided Court resolved an ambiguity in a statutory scheme against life, not in its favor. The instant case is not of that proportion but it does entail the resolution of unspoken assumptions—those favoring the status quo of prison

systems as opposed to those who see real rehabilitation as the only cure of the present prison crises. As Mr. Justice Holmes said, "judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 221.*

Judges do not make legislative policies. But in construing an ambigious word in a criminal code I would try to give it a meaning that would help reverse the long trend in this Nation not to consider a prisoner a "person" in the constitutional sense. Fay Stender writing in Maximum Security (1972) p. X has described some of the "tremendously sophisticated defenses against the least

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*Justice Holmes also said:

". . . in substance the growth of the law is legislative. And this in a deeper sense than that which the courts declare to have always been the law is in fact new. It is legislative in its grounds. The very considerations which the courts most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. We mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to public policy in the last analysis. And as the law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism, it will be found that when ancient rules maintain themselves in this way, new reasons more fitted to the time have been found for them, and that they gradually receive a new content and at last a new form from the grounds to which they have been transplanted. The importance of tracing the process lies in the fact that it is unconscious, and involves the attempt to follow precedents, as well as to give a good reason for them, and that hence, if it can be shown that one half of the effort has failed, we are at liberty to consider the question of policy with a freedom that was not possible before." Common Carriers and the Common Law, 13 Amer. L. Rev. (1879) 609, 630–631.

increase in the enforceable human rights available to the prisoner."

A less strict and rigid meaning of the present Act would be only a minor start in the other direction. But it is one I take.